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CALIFORNIA REPORTER

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SECOND SERIES

36 Cal.2d 677

STOCKTON DRY GOODS CO. v. GIRSH.

Sac. 6084.

Supreme Court of California, in Bank.

Feb. 2, 1951.

Rehearing Denied March 1, 1951.

Action by the Stockton Dry Goods Company, a California corporation, against Stanley Girsh for declaratory relief involving a lease. The Superior Court, San Joaquin County, George F. Buck, J., rendered judgment for plaintiff, and defendant appealed. The Supreme Court, Shenk, J., held that there was no implied covenant in the lease, that another shoe department would not be conducted in plaintiff's store in which defendant was lessee of a portion for a shoe department.

Judgment affirmed.

Prior opinion, 221 P.2d 186.

1. Covenants 🔑1
Landlord and tenant 🔑44(1)

A restrictive covenant as to property retained by a grantor or lessor must be evidenced by a clearly expressed intention.

2. Contracts 🔑143

Question of what is to be included in contract is for parties, not court, to determine.

3. Landlord and tenant 🔑134(5)

Fact that there had always been but one shoe department in store, would not support an inference that lessor and lessee had an implied covenant in their lease that another shoe department would not be conducted in store.

4. Landlord and tenant 🔑45

An implied covenant in lease cannot rest solely upon an inference to be drawn from facts surrounding execution of such lease but must have a basis in contract itself.

5. Contracts 🔑218

A condition cannot be read into a contract as to which parties might well be deemed to have remained intentionally silent.

6. Covenants 🔑8

Covenants may be implied when the implication must arise from language used or it must be indispensable to effectuate intention of parties or it must appear from language used that it was so clearly within contemplation of parties that they deemed it unnecessary to express it. Civ. Code, § 1648.

7. Covenants 🔑8

Implied covenant can only be justified on grounds of legal necessity. Civ. Code, § 1648.

8. Contracts 🔑168

A promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it. Civ. Code, § 1648.

9. Contracts 🔑168

There can be no implied covenant where subject is completely covered by contract. Civ. Code, § 1648.

10. Evidence 🔑20(1)

It is a matter of common knowledge that many stores have more than one department to supply similar lines of goods.

11. Evidence 🔑441(1)

Written memorial of parties supersedes their prior negotiations and becomes their contract.

12. Evidence 🔑441(4)

Where corporation operating department store leased space for a shoe department, but lease did not contain any stipulation to effect that lessee should have sole right to conduct shoe department in store, lessee could not offer proof of a conversation relating to an alleged oral understanding had with lessor prior to execution of lease, that lessee was to have sole right to conduct shoe department in store.

13. Declaratory judgment ⚷365

In action by lessor against lessee for declaratory relief involving lease of space in store to shoe department, wherein lessee claimed exclusive right to operate shoe department, although lease contained no express provision to that effect, question when conduct of another shoe department by lessor would amount to a breach of covenant of quiet possession and constitute a constructive eviction of lessee would not be determined. Code Civ. Proc. §§ 1060, 1856, 1858, 1860; Business and Professions Code, § 16600; Civ. Code, § 1927.

14. Landlord and tenant ⚷134(5)

Where owner of department store leased space for shoe department, there was no implied covenant by owner-lessor that another shoe department would not be conducted in store. Code Civ. Proc. §§ 1856, 1858, 1860; Business and Professions Code, § 16600; Civ. Code, § 1648.

◆

Willens & Boscoe and Gordon J. Aulik, Stockton, for appellant.

Mitchell, Johnson & Bates and Elbert J. Sheffield, Los Angeles, for respondent.

SHENK, Justice.

The plaintiff as lessor brought an action against the defendant lessee for declaratory relief pursuant to section 1060 of the Code of Civil Procedure. The existence of a controversy was alleged and placed in issue by the defendant's answer. The trial court found that a controversy existed as to a proper construction of the terms of the lease, and basing its findings on stipulated facts and the language of the lease, rendered judgment for the plaintiff. The defendant appealed.

The plaintiff owns a department store in the city of Stockton. For about twenty years prior to March 1944 one Ben Warshauer operated the shoe department of the store under a lease of a portion of the premises. Mr. Warshauer retired and in his place his brother-in-law, the defendant Stanley Girsh, was accepted as the lessee and now conducts the department. A written lease was entered into between the parties on March 7, 1944, providing for the renting of a twenty by fifty foot space of the Mezzanine floor near the stairway, "to be conducted as a Shoe Department", for a term of five years with option of renewal for a like term. The consideration was specified as ten per cent of all net cash sales and eleven per cent of all net charge sales. Other provisions regarding payments for utilities, thrift stamps, matters of wrapping and delivery service, management and sales policies, and privilege of window display space were included.

The plaintiff alleges that the defendant claims the sole and exclusive right under the lease to operate a shoe department in the store. The plaintiff disputes the claim and in turn asserts the right to set up one or more shoe departments in the store in competition with the defendant. On the trial the court excluded from consideration the defendant's offer of proof of conversations had between the parties prior to the execution of the lease. The evidence was offered as support for an asserted oral understanding that the defendant should have the sole right to conduct a shoe department in the store. The court concluded that the lease provisions did not amount to a grant to the defendant of the sole and exclusive right to operate a shoe department in the store.

The applicable principles are found in our codified law. The writing embodies the whole of the agreement between the parties and parol evidence to enlarge or explain it is excluded with certain specified exceptions, Section 1856, Code Civ. Proc., none of which, as will be seen, is applicable here. The function of the court is to ascertain what in terms or in substance is contained in the instrument and not to insert what has been omitted, or to omit what has been inserted. Code Civ. Proc. Sec. 1858. Sections 1856 and 1860 permit the judge to place himself in the position of the parties by receiving evidence of the circimstances under which the agreement was made, which in proper cases may explain an extrinsic ambiguity, establish illegality or fraud, or disclose a mistake or imperfection in the writing. There is here no contention that the language of the lease is ambiguous, that there was any illegality or fraud in the transaction, or any mistaken omission of an agreed provision. Reformation of the lease is not sought. It is not contended that there was a collateral agreement for the exclusive right based on a consideration. It is the defendant's contention that there is implicit in the lease of a portion of the store for the conduct of a shoe department an agreement on the part of the plaintiff that there would not be another shoe department conducted in the store. This is his contention despite the fact that such restrictive language is not in the lease and that a declaration to that effect would be to place a restriction upon the plaintiff's competition with the defendant and to create a covenant as to the use of the portion of the premises retained by the plaintiff without express provision therefor.

The general invalidity of contractual restraints on trade competition is provided by section 16600 of the Business and Professions Code. However, the prohibition has not been deemed to avoid express restrictive covenants as to the use of retained premises frequently incorporated in leases. See Medico-Dental etc. Co. v. Horton & Converse, 21 Cal.2d 411, 132 P.2d 457; Kulawitz v. Pacific etc. Paper Co., 25 Cal. 2d 664, 155 P.2d 24.

[1] A restrictive covenant as to property retained by a grantor or lessor must be evidenced by a clearly expressed intention. Wing v. Forest Lawn Cemetery Assn., 15 Cal.2d 472, 101 P.2d 1099, 130 A.L.R. 120; 51 C.J.S., Landlord and Tenant, § 238, page 865. For, as has been universally recognized, "where words do not amount to an agreement, covenant does not lie." O'Sullivan v. Griffith, 153 Cal. 502, 506, 95 P. 873, 875, 96 P. 323, and authorities cited.

The defendant has presented no decision where the court has read in the contract a provision for the restrictive covenant without language to support it. In argument he adopts the word "concession" with reliance on Belvedere Hotel Co. v. Williams, 137 Md. 665, 113 A. 335, 337, 14 A.L.R. 622, wherein the hotel company expressly granted "the barber shop and manicuring concession in its hotel", and the language was held to show an intention to grant the exclusive privilege for the lease term. The defendant also cites Keating v. Preston, 42 Cal.App.2d 110, 108 P.2d 479, where language leasing "All the space * * * necessary to do the restaurant business" in the hotel was held to intend the exclusive right to operate a restaurant in the hotel. The cases might be deemed authoritative here had the parties employed similar language.

[2-9] The question may not be resolved by what the parties might have provided had they thought about it, nor by what the court might conclude regarding abstract fairness. The question of what is to be included in the contract is for the parties, not for the court, to determine. Here the defendant seeks to build an implied covenant upon an inference from the fact that there had always been but one shoe department in the store. The implication however cannot rest solely upon an inference to be drawn from the facts surrounding the execution of the lease. It must have a basis in the contract itself. A condition cannot be read into a contract as to which the parties might well be deemed to have remained intentionally silent. Foley v. Euless, 214 Cal. 506, 511, 6 P.2d 956. With citation of that and other cases, the court in Cousins Inv. Co. v. Hastings Clothing Co., 45 Cal.App. 2d 141, 149, 113 P.2d 878, 882, summarized the rules when covenants may be implied as follows: "(1) The implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it;

(5) there can be no implied covenant where the subject is completely covered by the contract." See Sec. 1648, Civil Code.

[10–12] Here, without more, a small portion of a department store was let for the purpose of conducting "a shoe department." This is not language expressive of an exclusive grant and such a grant is not indispensable to effectuate the expressed intention of the parties. Nor does that or any language of the lease indicate that an exclusive grant was so clearly contemplated that it would be unnecessary to express it. Likewise there is no legal necessity for it, and it might just as well be assumed that had the attention of the parties been brought to it, they would not have agreed to it. The assumption is also readily apparent from the surrounding circumstances that the parties thought the time might arrive when one shoe department in the store would be insufficient to supply increased customer demand. It is a matter of common knowledge that many stores have more than one department to supply similar lines of goods. Should the court venture to redecide the question for the parties as a matter of construction contrary to the plain words of the agreement, it might well result in an injustice or inequity which they intended to avoid. This case, therefore, is governed by the well-settled principle that the written memorial of the parties supersedes their prior negotiations and becomes their contract, In re Estate of Gaines, 15 Cal.2d 255, 265, 100 P.2d 1055, citing authorities, and the trial court properly excluded the defendant's offer of proof.

[13, 14] Such questions as when the conduct of another shoe department by the plaintiff will amount to a breach of the covenant of quiet possession, Civ. Code sec. 1927, and constitute a constructive eviction of the defendant in the absence of an express restriction, cannot be determined in this proceeding. A determination of such matters depends upon the facts in a proper case. Cf. Lindenberg v. MacDonald, 34 Cal.2d 678, 214 P.2d 5, 14 A.L.R.2d 1436; Kulawitz v. Pacific etc. Paper Co., supra, 25 Cal.2d 664, 155 P.2d 24; Medico-Dental etc. Co. v. Horton & Converse, supra, 21 Cal.2d 411, 132 P.2d 457; Aaker v. Smith, 87 Cal.App.2d 36, 196 P.2d 150. Concern here is only with a construction of the contract to determine the existence of the bare permissive element in the use by the plaintiff of the retained premises. There is no merit in any claimed distinction in this respect because of the prescribed manner of computing the rental payments. That factor might bear on other questions, such as good or bad faith between the parties in their future conduct; but that and other unrelated provisions cannot in the present case supply an unexpressed restriction or grant. As indicated, the trial court has correctly resolved the question of the existence of an agreement for the exclusive conduct of a shoe department by the defendant adversely to his contentions.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

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36 Cal.2d 694

LOS ANGELES COUNTY v. BYRAM, Treasurer et al.

L. A. 21734.

Supreme Court of California, in Bank.

Feb. 7, 1951.

Application for writ of mandate by the County of Los Angeles, a body corporate and politic, against H. L. Byram, Treasurer of the County of Los Angeles and ex officio member of the Board of Retirement of the Retirement Association of the County of Los Angeles, organized and existing under the County Employees Retirement Law of 1937; and others to compel issuance of warrant by respondents to pay architect's fees incurred by petitioner county in preparation for construction of court building, to be erected by respondents on land of county and leased to county. Percy V. Hammon, intervened as a party in interest. The Supreme Court, Carter, J., held that assuming that lease of court building to county with option to purchase was an installment contract, obligation represented thereby was one imposed by law on county and therefore was not a debt or liability within debt limitation provision of constitution.

Peremptory writ issued.

Edmonds, J., dissented.

1. Counties ⚷150(2)

Even assuming the lease of court building to county, which building was to be constructed by retirement association of county on county land, was an installment contract, obligation of county to provide adequate quarters for court was imposed on county by law and therefore was not "debt" or "liability" within debt limitations of constitution. Government Code, §§ 31520, 31552, 31595(e), 31601, 31604, 31605; Const. art. 11, § 18.

See publication Words and Phrases, for other judicial constructions and definitions of "Debt" and "Liability".

2. Counties ⚷150(2)

An obligation imposed by law upon a city or county is not an indebtedness or liability within debt limitation provision of constitution. Const. art. 11, § 18.

3. Counties ⚷137

Duty of providing adequate quarters for courts is mandatory, explicit and imposed by law on the county.

4. Mandamus ⚷172

In mandamus proceeding by county against county Board of Retirement to compel issuance of warrant by Board for payment of architect's fees incurred by county in connection with construction of court building by Board under agreement to lease building to county, question whether lease was sufficient and definite, whether building could be erected for agreed price, and whether building was to be erected on site reserved by planning commission for erection of police building would not be determined. Government Code, §§ 31520, 31552; 31595(e), 31601, 31604, 31605; Code Civ. Proc. § 1255a.

◆

Harold W. Kennedy, County Counsel, and A. Curtis Smith, Asst. County Counsel, Los Angeles, for petitioner.

Bodkin, Breslin & Luddy and S. V. O. Prichard, all of Los Angeles, for respondents.

Irving M. Walker, Los Angeles, for intervener.

CARTER, Justice.

The controversy here presented concerns the validity of a contract for the construction of a court building in the county of Los Angeles. The selection of the site therefor was considered by this court in Simpson v. Hite, 36 Cal.2d 125, 222 P.2d 225.

The county owns real property situated in the city of Los Angeles, which has been selected for the erection of a court building. The Retirement Association of the County of Los Angeles which exists by virtue of statute (Gov.Code, § 31552) is governed by a retirement board of five persons (Gov.Code, § 31520) and its members comprise the employees of Los Angeles County. (Gov.Code, § 31552). The county has incurred liability for architect's and engineer's fees in preparation for the construction of the building. Pursuant to statute on August 27, 1950 (Gov.Code, §§ 31595 et seq.), an instrument designated "Lease Agreement with Options to Purchase" was entered into between the retirement board, designated "lessor" and Los Angeles County, designated "lessee". It is there provided that the lessor has offered to erect a building on the lessee's property (referred to as "site") and "rent" it to the lessee; that lessee grants to lessor permission to use its site for the purpose of the lease; that after receiving possession of the site lessor will procure a contract for the construction of this building according to the plans of the lessee within two years, with a possible time extension, at a cost of $6,000,000; that lessor assumes liability for architect's and engineer's fees heretofore incurred or paid; that lessor "leases" to lessee and lessee "rents" from lessor the building for a 50 year term; that lessee shall pay "rental" of $25,000 for the "use of the premises" for each month at the end thereof and an amount equivalent to the *ad valorem* taxes, and liens for special assessments and insurance premiums paid by lessor; that "it is expressly understood and agreed that each month's rental shall become due only in consideration of the right to possess, occupy, and use the Building during the preceding month, and it shall be the responsibility of the Lessor to provide such Building at all times"; that lessor keep building insured against various hazards; the lease may be terminated by either party when it has run the period (estimated at 40 years) prescribed in § 31604 of the Government Code, that is, when the retirement association has received its investment, plus interest; that lessee may not alter the building without lessor's consent; title to the site remains in the lessee, unless lessor exercises its option to purchase, and title to the building remains in lessor unless lessee's option to buy is exercised; maintenance of the building rests with lessee; lessee has the option to purchase the building during the term of the lease for the investment of lessor less 2% per year and if not exercised, lessor has option to buy or lease the site at the fair market value. The statute under which the retirement board and county entered into the lease provides that the funds of the retirement association held by the county treasurer shall be invested in "Real property or improvements constructed or to be constructed on real property when such real property or such improvements are acquired for sale or lease to the county in which the retirement system is established and subject to the limitations of this article." (Gov.Code, § 31595(e) as amended, Stats. 1949, ch. 199) "No investment shall be made in real property unless it is approved by unanimous vote of the board and a four-fifths vote of the members of the board of supervisors of the county in which the [retirement] system is established." (Gov.Code, § 31601, Stats. 1949, ch. 199) "Before an investment is made in real property the (retirement) board shall enter into a lease or lease option agreement with the county in which the retirement system is established under which the county agrees to rent the property at a monthly rental and for a period, not to exceed fifty years, sufficient to return not less than the investment together with interest at the rate prescribed in Section 31603. The agreement may contain an option or options to purchase provided such option together with the rentals will return not less than the investment together with interest at a rate ¾ percent higher than the rate fixed by Section 31591 of this code or in the event a different rate has been determined by the board then ¾ percent higher than the rate so determined at the time the agreement is made. In the event a building is built on county-owned land the agreement may contain an option to purchase the land at any time or at the termination of the lease at its then fair market value." (Gov.Code, § 31604, Stats. 1949, ch. 199) "In order to make the provisions of this article relating to the investment of retirement funds completely effective, the board is authorized, for investment purposes only, to purchase, sell or lease real property or to enter into options therefor and when necessary for investment purposes to enter into contracts for the construction of buildings and may repair and maintain such property and do any and all things necessary to protect the investment including, but not limited to, purchasing insurance against the loss of the property or the loss of use and occupancy of the property. It may also take any other action necessary to carry out the investment provisions of this article. In the construction of buildings the board shall follow, substantially and insofar as applicable, the procedure and limitations prescribed by law for the construction of buildings by the county in which the retirement system is established." (Gov.Code, § 31605, Stats. 1949, ch. 199)

In accordance with the lease requiring lessor to pay architect's fees incurred by the petitioner county, a demand was made on respondents members of the retirement board to draw a warrant to pay such fees and was refused. A writ of mandate is now sought to compel the issuance of such warrant.

In chief, it is contended that the lease was merely a subterfuge for what is really an installment contract for the purchase by petitioner of the building and as such represents a liability or indebtedness in excess of that authorized by the constitutional provision reading: "No county, * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose * * *." (Cal.Const. Art. XI, § 18) There has not been an approval by the electorate of the proposed transaction and while the "rental" payable under the lease will not exceed the debt limitation, the total amount thereof will.

There are two reasons why the lease is not invalid under the debt limitation provision.

[1] First, even assuming that the lease is an installment contract, the obligation represented thereby is one the law imposes upon the county and therefore is not a debt or liability within the contemplation of the constitution.

[2] An obligation imposed by law upon a city or county is not an indebtedness or liability within the meaning of the debt limitation provision. McCracken v. City of San Francisco, 16 Cal. 591, obligation to refund purchase price of property of city illegally sold by it; City of Long Beach v. Lisenby, 180 Cal. 52, 179 P. 198; Metropolitan Life Ins. Co. v. Deasy, 41 Cal.App. 667, 183 P. 243, and see McBean v. City of Fresno, 112 Cal. 159, 166, 44 P. 358, 31 L.R.A. 794, tort liability; Cashin v. Dunn, 58 Cal. 581; Welch v. Strother, 74 Cal. 413, 16 P. 22; Lewis v. Widber, 99 Cal. 412, 33 P. 1128; Martin v. Fisher, 108 Cal.App. 34, 291 P. 276; Lotts v. Board of Park Comm'rs, 13 Cal.App.2d 625, 57 P.2d 215, and see Harrision v. Horton, 5 Cal.App. 415, 90 P. 716, liability for salary of city or county officer or employee fixed by legislature; Oscar Heyman & Brother v. Bath, 58 Cal.App. 499, 208 P. 981, refund of illegal tax; American Co. v. City of Lakeport, 220 Cal. 548, 32 P.2d 622, cf. Wulff-Hansen & Co. v. Silvers, 21 Cal.2d 253, 131 P.2d 373, obligation of a city to purchase and pay into bond redemption fund land sold for delinquent special assessments where there are no other purchasers; Mills v. Houck, 124 Cal.App. 1, judgment against city for costs where it dismissed an eminent domain proceeding and such costs were allowed by § 1255a of the Code of Civil Procedure; see Arthur v. City of Petaluma, 175 Cal. 216, 165 P. 698; City of Pasadena v. McAllaster, 204 Cal. 267, 267 P. 873.

It has been held, however, that a claim on a contract for the burial of indigent dead is within the limitation for the reason that, although the obligation of burial rested on the county, the liability was expressed in a contract made with the undertaker-claimant and was a general, rather than specific, duty, Pacific Undertakers v. Widber, 113 Cal. 201, 45 P. 273, and the same as to a claim on a contract to furnish supplies to prisoners in jails, Goldsmith v. Board of Sup'rs of City & County of San Francisco, 115 Cal. 36, 46 P. 816, following the Pacific Undertakers case. Those cases were approved in Arthur v. City of Petaluma, supra, 175 Cal. 216, 165 P. 698, but there, as the court points out, the obligation to pay the printer for the publication of a charter was voluntarily assumed when proceedings to adopt a charter were voluntarily launched by the city. In other states there is a split of authority. (38 Am.Jur., Municipal Corps., §§ 453–455)

[3] There is no doubt that the duty of providing adequate quarters for courts is mandatory, explicit and imposed by law on the county. It has no choice in the matter. In Simpson v. Hite, 36 Cal.2d 125, 222 P.2d 225, 226, this court, in considering whether the selection of a site for the court building here involved was subject to referendum, said: "By *state law* boards of supervisors *are required* to provide 'suitable quarters' for superior and municipal courts. Such state law leaves to the boards of supervisors to determine, in each case, what is required to constitute 'suitable quarters.' It is *undisputed that suitable quarters for such courts are wanting and are needed in Los Angeles County,* and that the board of supervisors has so determined. * * *

"The *state legislature has declared* the legislative policy applicable here: that the board of supervisors shall provide suitable quarters for the municipal and superior courts. * * *

"Prescribing the policy and duty was the *legislative act of the state;* carrying out the policy by performing the duty is an administrative function delegated by the state to the local governing body, the board of supervisors. * * *

"Here the state has acted to establish the basic policy and has vested the responsibility for carrying out that policy in a board of supervisors. * * * However, in none of those cases was the court purporting to deal with a situation such as the one at bar, where the *legislative policy* has been *expressly fixed by the state* itself, and the execution of that policy has been *specifically imposed* by the state law on the board of supervisors as an administrative function. It would be beyond the powers of a board of supervisors to repeal or amend the state-declared policy * * *. The *board cannot escape the duty imposed upon it* by the state through the medium of declining to act * * *." (Emphasis added.) Since a specific mandatory obligation has been imposed on the county by the Legislature to provide suitable quarters for the courts in that county, the present facilities are not adequate, and the board of supervisors has determined that the proposed construction is necessary, we have an express law imposed obligation on the county which is not general, as in the Pacific Undertakers and Goldsmith cases, and the debts incurred in the performance of that duty are not within the debt limitation.

Second, there is no substantial distinction between the problem here and that involved in Dean v. Kuchel, 35 Cal.2d 444, 218 P.2d 521, and City of Los Angeles v. Offner, 19 Cal.2d 483, 122 P.2d 14, 145 A.L.R. 1358. In the Dean case, the state debt limitation was raised (Cal.Const., Art. XVI, § 1), the state owned the land which it leased to a private corporation which agreed to construct a building thereon and lease it to the state for a stated monthly "rental" and at the end of the term title vested in the state. Relying upon the Offner case, we held the lease not violative of the debt limitation. In the Offner case, "* * * a contractor agreed to build an incinerator on city owned land which the city leased to him for ten years at a rental of $1 per month, and he leased to the city the land and incinerator to be erected thereon for nine years and nine months, at a specified monthly rental. The city was given an option to buy the incinerator at various intervals during the term of the lease at a minimum price fixed by a schedule. If the city elected to exercise its option the purchase price was to be fixed by appraisers but not less than the minimums. Title to the incinerator was to remain in the contractor and if the option was not exercised it could be removed." Dean v. Kuchel, 35 Cal.2d 444, 446, 218 P.2d 521, 522. We find no rational or substantial distinction between this case and the Dean and Offner cases read together, and we are not disposed to overrule either of those cases.

Percy V. Hammon, a resident and taxpayer of Los Angeles County, a retired member of the retirement association, claiming to be a party in interest and intervenor makes numerous contentions with respect to the lease, in addition to the claim that it violates the debt limitation. He asserts that the lease is "invalid and unenforceable" because it is uncertain, in that the plans and specifications for the building as approved in the lease were still subject to correction, and under the lease no change could be made except by the agreement of the retirement board and county. We will not suppose in this proceeding that the parties will be unable to agree on such corrections as are necessary. It is not a case of no plans or specifications, for there exist the uncorrected ones.

[4] Continuing on the ground of uncertainty, it is claimed that there is no firm agreement that the building will be erected or the rental paid, but only that it shall be built if bids can be obtained from contractors at a price of $6,278,000, and until it is known that it can be built for such price, the retirement funds should not be invested. But it is provided in the lease that if it cannot be built for that figure, the lessor and lessee will redraft the plans. We will not assume in this proceeding they will not so agree. Nor do we know with any degree of certainty that it cannot be built for that figure. These are speculative conjectures as to whether the contract will be performed, which we do not deem appropriate in the proceeding before us, which concerns the legality of the lease and hence the legality of payment under the lease by the retirement board of the architect's and en-

gineer's fees expended by the county in the sum of $170,654.40.

Hammon asserts that the payment of such fees would be in excess of the powers of the retirement board, because there is no assurance under the lease that lessor's investment will be repaid as required by § 31604 of the Government Code. The lease on its face provides that it may be terminated when compliance has been had with § 31604. These and Hammon's other arguments and the posing of numerous and various contingencies that may or may not happen, bearing upon whether the investment will be repaid, are not appropriate for consideration in this proceeding.

The building cannot be built for the figure set forth in the lease, argues Hammon, for prices have risen since then and by a new estimate by his estimator it would cost over $7,000,000 as of December 27, 1950, and the lease will be frustrated. That does not go to the legality of the lease which is the sole question we are deciding. What can or cannot be done or agreed upon between the lessor and lessee is largely a matter of opinion, and is not an issue to decide in this proceeding. That is a matter primarily for the retirement board, the governing body of the association, and the board of supervisors to work out. The present proceeding is not one for declaratory relief—a declaration of the rights under the lease. The same comments are applicable to Hammon's argument that the investment is not a proper one under the law of trusts.

The lessee-county has no power to grant, as it has in the lease, under certain circumstances, to the lessor, an option to buy the land upon which the building is situated, says Hammon, and thus the lease is illegal. But the statute under which the lease was made expressly authorizes granting such an option. "In order to make the provisions of this article relating to the investment of retirement funds completely effective, the board of supervisors of the county in which the retirement system is established is authorized, subject only to the limitations of this article, to lease or purchase or enter into options to purchase real property in which retirement funds have been or are being invested and *to sell or give an option to sell real property to the board.*" (Emphasis added.) (Gov. Code, § 31606, Stats. 1949, ch. 199)

Since the Los Angeles Planning Commission has approved a master plan for the city with a site for a police building, it is claimed the site now mentioned for the court building is on the police building site, a change in the master plan without approval by the planning commission. It is doubtful that such change would affect the legality of the lease. But in any event, it is a far cry from the issues which we deem are properly before us, involving as it does, the planning commission and the retirement board which are not before the court, and the inadvisability of predicting the final action of the planning commission.

Let the peremptory writ issue as prayed.

GIBSON, C. J., and SHENK, and SCHAUER, JJ., concur.

TRAYNOR and SPENCE, JJ., concur in the judgment.

EDMONDS, Justice (dissenting).

The majority of this court concedes that there is no substantial difference between the factual basis of the present case and that shown in Dean v. Kuchel, 35 Cal.2d 444, 218 P.2d 521. For the reasons I expressed in connection with the latter decision 35 Cal.2d at page 449, 218 P.2d 521, I believe that the transaction between the county and the retirement board, although designated a "Lease Agreement with Options to Purchase", is no more than a cleverly designed subterfuge to evade the limitations of Article XI, section 18, of the Constitution.

By the terms of the "lease", the county is immediately obligated to pay for the construction of a $6,000,000 building. It may do this in one of two ways. The total amount of the investment, plus 3¾ per cent interest, may be paid in installments under the guise of rent. But the county must continue "rent payments" until it has returned to the retirement board all of the investment with interest. During the next 40 years, should the county desire to discontinue the installment payments it may do so only by exercising its option to purchase.

The option price is computed by "taking the total investment of the Lessor in such Building and reducing such total at the rate of 2% per annum on the remaining balance". The longer the county delays exercising its option, the lower the price becomes but, in the meantime, the monthly installments must be paid. These payments are closely geared to the option price; in one way or another the county must pay for the building. Manifestly, the ultimate purpose of the transaction is for the county to acquire ownership of the building without securing the approval of the electorate.

I would also deny relief in this proceeding upon grounds of public policy. Dean v. Kuchel, supra, 35 Cal.2d at page 454, 218 P.2d 521; City and County of San Francisco v. Linares, 16 Cal.2d 441, 448, 106 P.2d 369.

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36 Cal.2d 703

BAILARD et ux. v. MARDEN et al.

L. A. 21120.

Supreme Court of California, in Bank.

Feb. 9, 1951.

Suit by Willis R. Bailard and wife against Muriel Marden and others for reformation of a deed and other relief. The Superior Court, Los Angeles County, Alfred E. Paonessa, J., rendered a judgment for plaintiffs and defendants appealed. The Supreme Court, Edmonds, J., held that evidence that vendors sold lot under mistaken belief that it was restricted to use for residential purposes and that purchasers intended to use lot for residential purposes did not warrant reformation of contract of sale and deed to restrict the lot to use for a private residence in absence of evidence that purchasers intended to buy the property subject to such restriction.

Judgment reversed.

For prior opinion, see 219 P.2d 806.

1. Reformation of Instruments 🔑1

The purpose of reformation is to effectuate the common intention of both parties to transaction which was incorrectly reduced to writing. Civ. Code, § 3399.

2. Reformation of Instruments 🔑6

To obtain the benefit of statute providing for revision of a written contract which because of fraud or mistake does not express the intention of the parties, the parties must have had a complete mutual understanding of all the essential items of their bargain, since if no agreement was reached, there would be no standard to which the writing could be reformed. Civ. Code, § 3399.

3. Reformation of Instruments 🔑2

Courts of equity have no jurisdiction to make new contracts for the parties or to reform an instrument according to the terms in which one of the parties understood it, unless it appears that the other party also had the same understanding. Civ. Code, § 3399.

4. Reformation of Instruments 🔑45(3, 7)

Evidence that lot in business area of subdivision, which owners intended to retain, was mistakenly subdivided and sold under mistaken belief of vendors that it was restricted to use for private residential purposes, and evidence that purchasers intended to use lot for residential purposes did not warrant reformation of contract of sale and deed to restrict the lot to use for a private residence, in absence of evidence that purchasers intended to buy the lot subject to such restriction or accept a deed containing such restriction. Civ. Code, § 3399.

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Hiram T. Kellogg, Los Angeles, for appellants.

McGinley & Hanson and Howard D. Hanson all of Los Angeles, for respondents.

EDMONDS, Justice.

Willis R. Bailard and his wife conveyed real property to Muriel Marden. The deed declared that the grant was made subject to all conditions and restrictions of record. By the mistake or inadvertence of the

Bailards and their agents, the restrictions of record did not limit the use of the lot to residential purposes. When this situation became known to the Bailards, they sued for reformation of their deed and other relief. The appeal is from the judgment in favor of the Bailards.

In their third amended complaint a mutual mistake by the contracting parties was pleaded for a first cause of action. More particularly, it was alleged that at the time of execution of the agreement of sale and the deed the Bailards did not know lot 21 was within the "business area", nor did they know or intend to permit its use for other than residence purposes. The same mistaken belief was held by the Mardens at the time they signed the agreement of sale and received the deed. Had the Bailards known the true facts, they would not have sold the lot.

For a second cause of action, the allegations concerning the Bailards' mistake were again stated. It was also charged that the Mardens, at the time of the execution of the agreement of sale and deed, knew of the mistake made by the Bailards or suspected that it existed.

The complaint prayed for reformation of the agreement of sale and the deed to restrict the property to use for a private single-family residence. In the event reformation is not decreed, the Bailards ask for rescission of the conveyance upon restoration of the purchase price and all moneys expended in improving the property, with interest.

The answer denied that any mistake was made by the Bailards. The Mardens pleaded that they purchased the lot for income purposes and, at the time of purchase, formulated the plan of constructing a motel and incidental business buildings. They selected the property because of the opportunity it would afford the family for income and employment, and, prior to the purchase, made an independent investigation of the official records and ascertained the applicable restrictions. In answer to the second cause of action, they denied that they knew or suspected a mistake had been made by the Bailards, or that the property would not have been conveyed to them in the absence of such mistake.

The evidence offered upon these issues shows that Bailard purchased several hundred acres of land from Marblehead Land Co. Prior to the conveyance, the entire tract was restricted for use as private single-family residences. Bailard agreed to purchase the property upon condition that the restriction be changed to give him the right to construct, upon the land adjoining the highway, one motel and buildings for incidental businesses. The restrictions were accordingly amended to provide for a "business area". Surveyors employed by Bailard to prepare a subdivision map of the tract were instructed to subdivide only the residence area. By mistake upon the part of the surveyors, a portion of the "business area" was shown on the map as lots 14 to 25. This subdivided part of the "business area" is located upon a high bluff as contrasted with the remainder of the area which is relatively flat. The map was signed by Bailard and recorded.

Bailard testified that he purchased the tract for the purpose of subdividing and selling the residential area. His plan was to retain the "business area" upon which to construct an elaborate motel and incidental business buildings. His selling agent knew of the restrictions upon the property, and instructed the salesmen to inform prospective buyers that the lots were being sold for residential purposes only. All advertisements in connection with the tract, Bailard stated, offered the lots for sale as "home sites", and he first learned of the mistake when construction of a motel was commenced by the Mardens.

The map and advertisements show lot 21 to be the smallest and lowest priced one in the tract. It is situated upon the edge of a bluff and there is evidence that, although ideal for residence property, it is unsuited for business uses. This testimony was offered in corroboration of Bailard's declarations concerning his intentions regarding the property, and his statement that lot 21 would not have been sold in the absence of the mistake made on the map.

As Mrs. Marden related the details of the purchase of the land, while looking for the business property which would give income and employment to the members of her family, she saw signs along the Pacific

Coast highway advertising business lots. There were no such signs on Bailard's tract. She was shown lot 21 by one of Bailard's salesmen. She did not inquire of him, or of anyone connected with the seller, about restrictions on lot 21 or other lots in the tract, or whether it could be used for business purposes. However, her son asked the salesman for the name of the owner of the property so he could check the recorded deed with reference to restrictions. When Mrs. Marden was asked on cross-examination for what kind of business she intended to use lot 21, she said no definite plans had been made at the time of purchase; they were to be developed in the future. According to her testimony, she "just walked on the property and saw where it was sitting, nice and high; it was on a corner, and that it might be possible to put business on the property".

Mrs. Marden also stated that she and her son examined the recorded restrictions. Thereafter, they went to the property and determined, by use of their automobile speedometer, that lot 21 was within the "business area". The son reached the same conclusion by examining a map of the county engineer. They knew from the recorded deed that only one motel was permitted. However, they did not, before their purchase, inquire as to whether any plans for such a building had been approved.

Shortly afterward, Mrs. Marden, her son, and two daughters purchaser lot 21, as a family enterprise "for a home and income". The consideration was $850. Bailard had no direct dealings with the purchasers; all of the negotiations were carried on through his agents who had been instructed to sell residential lots only. The lot was purchased under a contract of sale. In this contract and the deed executed two years later, the lot was described by reference to the subdivision map. However, the agreement of sale was made subject to "All of the conditions, restrictions, reservations, easements and exceptions set forth in that certain [recorded] grant deed" made by the land company to Bailard. The deed of Bailard and his wife to Mrs. Marden included a similar provision.

The Mardens constructed no improvements upon their lot until nearly four years after purchasing it. They then built what they referred to as a "tool shed". The family lived in this building. The Mardens' explanation as to the reason why plans for this building were not submitted to the land company for approval was that they did not know such action was required by their deed. They planted about 100 trees upon the lot and built a wire fence about it. Building materials were purchased from time to time without any definite purpose as to their use. All of the materials purchased were adaptable for the construction of a single-family residence. They were unable to estimate the time or money expended upon the improvements and no books or records were kept.

According to Mrs. Marden's testimony, about one year after the "tool shed" was built, she called at the office of the land company and requested a clarification of the meaning of the restrictions contained in her deed. She was advised that lot 21 was situated in the "business area". She then inquired about the procedure for submitting plans for a motel. About two weeks later plans were submitted and rejected. A second set of plans was approved. When she submitted the plans, Mrs. Marden testified, Fred W. Marlow, an officer of the land company, stated, in substance, "there had been a big boner pulled" by some one which permitted construction of a motel upon their lot; Bailard had been in the office and was "burned up" about the situation. Marlow denied having made such a statement and declared that he did not remember seeing the Mardens until he appeared as a witness.

The trial court found that at the times of the execution of the sales agreement and of the deed, both Bailard and the Mardens believed that lot 21 was restricted for use as private single-family residence and intended that it be so restricted. Neither of them believed or intended that the exceptions in the deed from the land company, the sales agreement, or the deed to the Mardens, would permit the construction of a motel upon the property. Also, the findings recite, the Mardens knew that this belief and understanding of the restrictions were entertained by the Bailards. As conclusions of law upon these findings, the court declared that the Bailards are entitled to a modification of the agreement of sale and of the deed to conform to their belief and intention, and it enjoined the Mardens from using the property for other than residential purposes.

As ground for reversal of the judgment which follows the court's conclusions, the Mardens contend that the evidence does not support the conclusion that the transaction was based upon a mutual mistake. Neither is there any evidence, they say, of any knowledge or suspicion by them that the Bailards sold the lot under any mistaken belief as to the restrictions. For these reasons, it is argued, all that is shown by the evidence is a unilateral mistake which cannot be corrected by reformation. The Mardens further contend that the Bailards were negligent and guilty of laches. They also insist that the alleged mistake complained of was not material to the contract.

[1, 2] Section 3399 of the Civil Code provides that when, because of fraud or mistake, "* * * a written contract does not truly express the intention of the parties, it may be revised * * * so as to express that intention * * *." The purpose of reformation is to effectuate the common intention of both parties which was incorrectly reduced to writing. To obtain the benefit of this statute, it is necessary that the parties shall have had a complete mutual understanding of all the essential terms of their bargain; if no agreement was reached, there would be no standard to which the writing could be reformed.

[3] Otherwise stated, "[I]nasmuch as the relief sought in reforming a written instrument is to make it conform to the real agreement or intention of the parties, a definite intention or agreement on which the minds of the parties had met must have pre-existed the instrument in question." 45 Am.Jur. § 7, p. 586; Holmes v. Anderson, 90 Cal.App. 276, 265 P. 1010; 5 Williston, Contracts [rev. ed.], § 1548, p. 4339; Rest., Contracts, § 504, comment b. Our statute adopts the principle of law in terms of a single intention which is entertained by both of the parties. "Courts of equity have no power to make new contracts for the parties, * * * [N]or can they reform an instrument according to the terms in which one of the parties understood it, unless it appears that the other party also had the same understanding." (22 Cal.Jur. § 2, p. 710.) If this were not the rule, the purpose of reformation would be thwarted.

In the present case, insofar as the right to reformation in concerned, the basic question is whether the Mardens intended the agreement of sale and the deed to prohibit the use of lot 21 for income purposes. The trial court found that they did so intend and reformed the instruments to include such restrictions.

This finding, the Bailards insist, is supported by evidence which affirmatively shows that the Mardens purchased lot 21 for use as a private residence and with no intention of constructing a motel upon it. The same evidence, it is said, refuted the testimony of the Mardens concerning their alleged inspection of the recorded map and deed, and shows that their entire defense was a recently contrived attempt to take advantage of the Bailards' honest mistake. In particular, the Bailards point to the physical characteristics of the property which make it highly suitable for a residence but less adaptable to business uses. Much is made of the Mardens' admitted failure to ask the selling agents whether the property could be used for income purposes and testimony that, when inspecting the lot, they "* * * were just talking about the beauties of the land."

The subject of restrictions upon use was not mentioned by the Mardens when the lot was purchased. The evidence also shows that, for approximately five years after acquiring the property, they used it only for residential purposes. In connection with that use, they lived upon the land, fenced it, and planted trees. From the evidence concerning their dealings with the land company, an inference might be drawn of lack of knowledge, at the time of purchase, that a motel could be constructed upon the site.

[4] This evidence, as the Bailards argue, tends to prove that the Mardens did

not purchase lot 21 for income purposes or in reliance upon the restrictions of record. More specifically, it would support a finding that they then intended to use the property for residential purposes in accordance with a deed allowing them to do so. But it does not establish that they ever intended to buy the property under a contract prohibiting any other use or to accept a deed including such a restriction. Under these circumstances, reformation of the contract and the deed to prohibit the erection of any building other than a single-family residence does not express "the intention of the parties". Rather, it is the creation of a contract which the evidence does not show was ever agreed to by the Mardens.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

36 Cal.2d 671

BOARD OF SUPERVISORS, COUNTY OF LOS ANGELES v. SIMPSON, Dist. Atty. County of Los Angeles.

L. A. 21704.

Supreme Court of California, in Bank.
Feb. 2, 1951.

Proceedings for writ of mandamus by Board of Supervisors of the County of Los Angeles, petitioner, against W. E. Simpson, District Attorney of the County of Los Angeles, respondent, to require respondent to institute proceedings for abatement of a public nuisance. The Supreme Court, Carter, J., held that it was the duty of the District Attorney to prosecute action for abatement of house of prostitution.

Writ granted.

1. Nuisance 🔑77

An action or proceeding by a public authority to abate a public nuisance is civil in nature. Code Civ.Proc. § 731, St. 1913, P. 20.

2. Statutes 🔑223.4

A particular statutory provision should prevail over a general one.

3. Counties 🔑81, 88

Where county counsel is appointed pursuant to county charter, the provisions of the Government Code relating to county counsel does not apply. Government Code, §§ 27640, 27642.

4. Counties 🔑81, 88

Inasmuch as office of county counsel of Los Angeles County has been created through charter, county counsel does not have the powers and duties of a district attorney, except as given by charter. Government Code, §§ 27640, 27642.

5. Nuisance 🔑77

Proceedings under the red light abatement act for abatement of house of prostitution are somewhat in the nature of action to recover penalties or forfeitures and are penal in nature, as fixtures and paraphernalia in place abated are partially forfeited and place may be closed for a year. St.1913, P. 20, § 7.

6. Nuisance 🔑77

The abatement of houses of prostitution is in aid of and auxiliary to the enforcement of the criminal law. St.1913, P. 20 § 2.

7. Nuisance 🔑82

Where red light abatement act expressly provided that it was duty of the district attorney to prosecute actions for abatement of houses of prostitution, although county charter invested county counsel with exclusive charge and control of all civil actions and proceedings in which the county or any officer thereof was concerned, it was the duty of the district attorney under the specific statute rather than the county counsel to prosecute action for the abatement of house of prostitution. St.1913, P. 20, §§ 1–3.

8. Mandamus 🔑73(1)

Where request of board of supervisors that district attorney institute proceedings for the abatement of house of prostitution was refused on ground duty rested on county counsel, mandamus was proper remedy. Code Civ.Proc. § 731; Government Code, § 26528.

9. Nuisance ⚷82

Under statutes which provided in effect that district attorney, "must" or "shall," bring an action to abate a public nuisance when so directed by Board of Supervisors, the quoted words are construed as mandatory. Code Civ.Proc. § 731; Government Code, § 26528.

See publication Words and Phrases, for other judicial constructions and definitions of "Must" and "Shall".

Harold W. Kennedy, County Counsel, Gerald G. Kelly, Asst. County Counsel, Milnor E. Gleaves and Arvo Van Alstyne, Deputy County Counsel, all of Los Angeles, for Petitioner.

W. E. Simpson, Dist. Atty. in Pro Per. and Jere J. Sullivan, Deputy Dist. Atty., Los Angeles, for respondent.

CARTER, Justice.

In this mandamus proceeding, petitioner, the Board of Supervisors of Los Angeles County, seeks to require respondent, district attorney of that county, to institute proceedings for the abatement of a certain public nuisance as directed by petitioner.

[1, 2] The undisputed petition shows that petitioner has been presented with facts and has determined that a certain building situated in Los Angeles County is being used for "lewdness, assignation and prostitution." It directed respondent to commence an action to abate the nuisance, but respondent refused to act asserting that the duty of bringing the action rested on the county counsel rather than the district attorney. Places used as described are declared to be public nuisances and abatable by action by the district attorney in the name of the people, Stats.1913, p. 20, §§ 1–3, by the statute known as the red light abatement act.

The Los Angeles County charter invests the county counsel with the duty of representing all county officers in all matters pertaining to their duties and with "exclusive charge and control of all civil actions and proceedings in which the county, or any officer thereof, is concerned or is a party." Los Angeles Co. Charter, § 21; Stats.1913, p. 1484. It has been held that an action or proceeding by a public authority to abate a public nuisance is civil in nature. People v. Macy, 43 Cal. App. 479, 482, 184 P. 1008; People ex rel. Bradford v. Arcega, 49 Cal.App. 233, 193 P. 268; see Code Civ.Proc. § 731; Stats.1913, p. 20. This lends some support to the view that it is the duty of the county counsel to prosecute actions to abate nuisances. There are, however, other factors of more persuasive significance which compel the conclusion that the duty rests upon the district attorney.

The charter provides that each county officer shall have the powers and perform the duties now or hereafter prescribed by general law and by the charter (§ 25). The district attorney and county counsel are named as county officers (§§ 12, 14). The statute (red light abatement act) expressly and particularly imposes upon district attorneys the duty of maintaining actions in equity to abate houses of prostitution. Stats.1913, p. 20, §§ 2, 3. "A civil action may be brought in the name of the people of the State of California to abate a public nuisance * * * by the *district attorney* of any county in which such nuisance exists * * * and such district attorney * * * of any county * * * in which such nuisance exists *must* bring such action whenever directed by the board of supervisors of such county * * *." (Emphasis added.) Code Civ. Proc. § 731. See also Govt.Code, § 26528. Thus the particular duty with respect to abatement of public nuisances is that of the district attorney. That is a factor with some significance as a particular statutory provision should prevail over a general one. Civ.Code, § 3534; Code Civ.Proc. § 1859; Division of Labor Law Enforcement v. Moroney, 28 Cal.2d 344, 170 P.2d 3.

[3, 4] Under the general law, in any county with a population of over 60,000, the board of supervisors may, except in one with a charter providing that the district attorney is attorney for one or more county officers, appoint a county counsel. Govt. Code, § 27640. Los Angeles County does not fall within that exception as seen from its charter, supra, under which the county counsel represents county officers. When the board appoints a county counsel pursu-

ant to *this chapter,* Govt.Code, Title 3, Div. 2, Pt. 3, Ch. 12, he "shall discharge all the duties vested by law in the district attorney other than those of a public prosecutor." Govt.Code § 27642. That section and § 27640 were new in 1941, being then added as § 4041.12a to the Political Code. Stats.1941, Ch. 618, § 2. Another section provides that in counties having a county counsel appointed pursuant to the same chapter 12, he shall discharge all the civil duties vested in the district attorney. Govt.Code, § 26529. Apparently the county counsel of Los Angeles County is appointed pursuant to its charter which has provided for such office since its adoption in 1913, rather than the Political Code and its successor the Government Code. That being true, the provisions of the Government Code relating to county counsels would not apply to the situation where the office of county counsel is established by charter in the manner here appearing. It is true the charter gives to the county counsel the powers and duties provided by general law, but the provisions of the Government Code with reference to county counsels are not general in the sense that they apply to all county counsels however they hold office. They apply only to county counsels appointed thereunder. Thus it follows that the county counsel here does not have the powers and duties of a district attorney except as they are given by § 21 of the charter. On the other hand, the district attorney has all the powers and duties conferred by the laws of the state, except as limited by the provisions of the charter.

[5, 6] Even if it be assumed that the provisions of the Government Code on county counsels apply to the Los Angeles county counsel, still properly construed, the duty rests upon the district attorney. The abatement of places under the red light abatement act is more appropriately the duty of the district attorney since it is compatible with his duties as public prosecutor. It will be remembered that the proceeding is prosecuted in the name of the people of the state, as are criminal prosecutions, which indicates that the county as such is not as much concerned as the people of the state. The Government Code, in speaking of the duties of the district attorney, states that he is "the public prosecutor" and must "conduct on behalf of the people all prosecutions for public offenses" and prosecute actions for the recovery of "fines, penalties, and forfeitures" accruing to the state or his county. Govt.Code, §§ 26500–26502, 26521. Proceedings under the red light abatement act are somewhat in the nature of actions to recover penalties or forfeitures, for thereunder the fixtures and paraphernalia in the place abated are partially forfeited and the place may be closed to use for any purpose for a year. Stats.1913, p. 20, § 7. It is penal in nature. See State ex rel. Whall v. Saenger Theatres Corp., 190 Miss. 391, 200 So. 442; Hofferman v. Simmons, 177 Misc. 962, 32 N.Y.S.2d 244. While actions to abate nuisances are considered civil in nature (cases cited supra) the abatement of houses of prostitution is in aid of and auxiliary to the enforcement of the criminal law. Such places are declared public nuisances. Stats.1913, p. 20. Each and every day a public nuisance is maintained is a separate offense and is a misdemeanor which it is the duty of the district attorney to prosecute by continuous prosecutions. Pen.Code, § 373a. In general, any person maintaining a public nuisance is guilty of a misdemeanor. Pen. Code, § 372. It is aptly said in People ex rel. Bradford v. Barbiere, 33 Cal.App. 770, 775, 166 P. 812: "The general object of the legislation involved in the said act (red light abatement act) is, it is obvious, no different from that of certain penal statutes which have been upon the pages of our law books for many years. Sections 315 and 316 of the Penal Code declare it to be a misdemeanor for any person to keep or reside in a house of ill fame in this state, resorted to for purposes of prostitution or lewdness, or to keep a disorderly house, or any house for the purpose of assignation or prostitution. And the last-named section further places a ban upon the act of letting or leasing property to another, where the owner of the property knows that the same is to be used for the purpose of assignation or prostitution, and makes such act a misdemeanor. "The abatement act is only in furtherance

of the policy of the state as established by the sections of the Penal Code above adverted to, and differs in a general sense from those sections only in that, unlike those sections, its design was to establish a summary method, through the civil processes of the law, for putting a stop to the maintenance of houses of ill fame, as that designation is commonly understood, and other like places, where acts of lewdness and prostitution are habitually practiced and carried on as a business. The act, in other words, represents only the concrete application of the state's power of police, and, preferably to the courts of criminal jurisdiction, invokes the aid of the civil courts as the most certain instrumentality for the suppression of an evil which has been by the Legislature deemed of so pernicious a nature, in its effect upon society, as to have actuated that body in denouncing its practice as a public crime." People ex rel Bradford v. Barbiere, 33 Cal.App. 770, 775, 166 P. 812, 814. Hence we think that § 27642 of the Government Code reserving to district attorneys the duties of public prosecutor should embrace the abatement of such nuisances.

[7] It follows from the foregoing factors that it is the duty of the district attorney rather than the county counsel to prosecute actions for abatement of houses of prostitution.

[8, 9] That mandamus is the proper remedy is clear. As pointed out above, the district attorney *must* or *shall* bring an action to abate a public nuisance when so directed by the board of supervisors. Code Civ.Proc. § 731, supra; Govt.Code, § 26528. "Shall" is mandatory, Govt.Code, § 14, and certainly "must" is also. The writ of mandamus issues "* * * to compel the performance of an act which the law specially enjoins, as a duty resulting from an office * * *." Code Civ.Proc. § 1085. The statutes, Code Civ. Proc. § 731; Govt.Code, § 26528, specifically "enjoin" upon the district attorney "as a duty resulting from (his) office" the bringing of actions to abate public nuisances when directed by the board of supervisors. It may well be that where he is not directed by the board he has some discretion in the matter, Code Civ. Proc. § 731; Stats.1913, p. 20, § 3, but plainly there is none where he is so directed. Moreover, in this case he refuses to exercise any discretion he might have as his failure to act is based solely upon his claim that the duty rests upon the county counsel; thus mandamus would be proper. See Hollman v. Warren, 32 Cal.2d 351, 196 P.2d 562.

Ordinarily a district attorney cannot be compelled by mandamus to prosecute a criminal case, see Boyne v. Ryan, 100 Cal. 265, 34 P. 707; 55 C.J.S., Mandamus, § 69(f), but here the mandatory duty to prosecute is imposed upon him and the statute leaves him no discretion to exercise. In Boyne v. Ryan, supra, the court seemed to feel that mandamus would not lie because the court could not supervise the many ramifications of the prosecution of the action. In the instant case, however, the district attorney is not refusing to prosecute the action for any reason other than his view that he has no authority under the law. Under these circumstances we may presume he will diligently prosecute once he has commenced the action. See Code Civ.Proc., § 1963(15).

It is ordered that a peremptory writ of mandamus issue as prayed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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102 Cal.App.2d 223

In re KEYSTON'S ESTATE.

KEYSTON et al. v. KEYSTON.

Civ. 18089.

District Court of Appeal, Second District,
Division 3, California.
Feb. 9, 1951.

Proceedings in the matter of the estate of Alfred J. Keyston, deceased, wherein Mary B. Keyston and Mary B. Keyston, guardian ad litem of Lanny J. Keyston, a minor, filed objections to the current account of D. W. Keyston, trustee. The Superior Court, Los

Angeles County, Roy L. Herndon, J., entered an order settling the current account of the trustee, allowing attorney's fees, and denying the objector's petition to remove the trustee, and the objectors appealed. The District Court of Appeal, Parker Wood, J., held that the evidence did not support the order settling the account.

Order settling account and order allowing attorney's fees reversed with direction.

See also 96 Cal.2d 550, 215 P.2d 754.

1. Trusts 🔑179

A trustee is bound to act in highest good faith toward his beneficiary.

2. Trusts 🔑166(1)

A trustee may be removed when it appears that his private interests conflict with his trust duties.

3. Trusts 🔑166(1)

Whether trustee has acted in highest good faith toward his beneficiary and whether he should be removed because of conflict between his private interest and his trust duties are matters within sound discretion of trial court and are dependent upon circumstances of each particular case.

4. Trusts 🔑166(1)

Court will less readily remove trustee named by settlor than a trustee appointed by court, and court will not ordinarily remove a trustee named by settlor upon ground existing at time of his appointment and known to settlor and in spite of which settlor appointed him, even though court would not have appointed him trustee.

5. Trusts 🔑167

Evidence sustained trial court's order denying petition to remove trustee on ground that his interest as officer and director of corporation whose stock was corpus of trust conflicted with his trust obligations.

6. Trusts 🔑322

Where corpus of testamentary trust consisted primarily of stock of corporation of which trustee was stockholder in complete control, trustee should have rendered account which stated specifically what amounts paid to beneficiaries were dividends and dates when such payments were made and what amounts were paid as advances of principal especially in view of fact that one of such beneficiaries was minor.

7. Trusts 🔑325

Evidence did not support trial court's order settling current accounts of trustee of testamentary trust where corpus of trust consisted primarily of stock of corporation of which trustee was stockholder in complete control.

8. Trusts 🔑330

Where evidence did not support trial court's order settling current account of trustee, trial court's award of $850 as attorney's fees for trustee's counsel was excessive, in view of general and inaccurate accounts rendered and in view of allegedly poor financial condition of corporation whose stock was corpus of testamentary trust.

9. Trusts 🔑194

In contested proceedings to settle current account of trustee of testamentary trust consisting primarily of stock of corporation of which trustee was stockholder in complete control, where trustee sought order to sell shares of stock to reimburse corporation for advances of principal made to beneficiaries, trial court's order authorizing trustee to sell, subject to confirmation, sufficient stock to produce sum necessary to reimburse corporation was not sufficiently definite when it failed to specify number of shares of stock to be sold and failed to state minimum price for which each share might be sold.

10. Trusts 🔑326

In proceedings to settle current account of trustee of testamentary trust consisting primarily of stock of corporation of which trustee was stockholder in complete control, where beneficiaries filed objection to account, inquiry upon question as to whether corporation's indebtedness to settlor in sum of $22,000 had been paid would be material as bearing upon question of corporation's ability to pay dividends.

Aides, Fairfield & Schwamb and Joseph W. Fairfield, all of Los Angeles, for appellants.

Don Lake, Los Angeles, for respondent.

PARKER WOOD, Justice.

Appeal by beneficiaries of a testamentary trust, as objectors, from an order settling current account of trustee, allowing attorney's fees to trustee, and denying the petition of the beneficiaries for removal of the trustee.

In 1939, Alfred J. Keyston purchased 1450 shares of stock of the Lichtenberger-Ferguson Company, a corporation, which was all the stock of the corporation except 500 shares of treasury stock. At the time of said purchase the corporation, which was a manufacturer of saddles and other leather goods in Los Angeles, was in receivership. It appears that Alfred conducted the business alone until 1942, when his brother, Donald W. Keyston, became associated with him in conducting the business, and at that time the corporation was engaged in manufacturing war materials. In April, 1943, Donald acquired the 500 shares of treasury stock. In 1945, Alfred, who had become a member of the United States Marine Corps, was killed in the war. At that time Donald was a director and vice-president of the corporation. Alfred left a will in which he named Donald as executor, and in which he gave his 1450 shares of stock to Donald in trust and directed that the income therefrom be divided between his widow, Mary B. Keyston, and his minor son, Lanny J. Keyston. In order to obtain money with which to pay estate and inheritance taxes, 200 of the said 1450 shares of stock were sold by the executor (Donald) to J. W. Keyston, the father of Donald and Alfred. In February, 1946, the court appointed Donald trustee and ordered distribution of the estate. Pursuant to that order, the 1250 shares of stock which remained in the estate were distributed to Donald as trustee. Donald became president of the corporation, and he continued to serve as one of its four directors. The other three directors were Donald's attorney, a bookkeeper who was an employee of the corporation, and J. W. Keyston. It appears that during 1946 the corporation obtained authority to issue 700 additional shares of stock. Donald acquired the 700 shares in 1946 and 1947. Then, the 2650 shares of stock of the corporation were held as follows: 1250 by Donald as trustee, 1200 by Donald individually, and 200 by J. W. Keyston. In 1946 and 1947 dividends were declared.

On September 16, 1949, the trustee filed his first account current, which covered the period from February 21, 1946, to August 30, 1949. He stated therein that he was chargeable with 1250 shares of Lichtenberger-Ferguson stock of the appraised value of $81,250. He also stated therein that he had paid to Mary B. Keyston, to be used one-half for her and one-half for Lanny J. Keyston, the following sums: $2,350 in 1946; $2,875 in 1947; $3,125 in 1948; and $1,964 in 1949 (or a total of $10,312.68). He requested therein permission of the court to sell such shares of said stock as may be necessary to obtain money to pay his attorney the sum of $850 for services rendered.

Mary B. Keyston individually and as guardian ad litem of Lanny J. Keyston filed objections to the trustee's account, and at the same time she filed a petition for the removal of the trustee. In said petition she alleged that, "D. W. Keyston, individually, and as trustee and by virtue of his holdings as shareholder in the said Lichtenberger-Ferguson Company, individually and as trustee, is a majority shareholder of the said corporation, and that as such, has been able to control and manage the affairs of the said corporation and has so controlled and managed the affairs of the said corporation for his own purpose, use and benefit and to the detriment of the beneficiaries of said trust." She further alleged therein that the trustee, by virtue of his individual holdings in said corporation, and "as an officer and director and shareholder of said corporation, has interests which are antithesis to the interest of the trust, and as such cannot exercise his duties as a trustee with the full faith and capability as is required by a trustee."

On October 11, 1949, the trustee filed an amendment to said account in which he stated that the total sum shown in his current account as having been paid the beneficiaries included an advance of principal in the amount of $4,150; and he requested that the court authorize him to sell such shares of stock as may be necessary to reimburse the Lichtenberger-Ferguson Company for the said advance of principal to the beneficiaries.

At the hearing the trustee testified that in 1946 the corporation "was earning money"; it paid dividends in 1946 and 1947, but it lost money in 1948; during 1948 the corporation began advancing money to the account of the beneficiaries, and it made further advances to their account in 1949; the total amount so advanced was $4,150; in 1949 the sum of $964.68 was also paid to the beneficiaries, which amount was a tax refund to the trust estate; each year he gave Mary B. Keyston an accounting of the trust account, but he did not give her a paper showing the corporate earnings. He testified further that the appraised value of the stock, shown in his current account to be $81,250, was the value as appraised in 1946; the stock had not been appraised since 1946, and (at the time of trial) it was not worth that much, but was worth "probably 50 some-odd dollars a share"; the corporation was doing no more "war work"; it was operating at a loss, and it then owed the bank $13,000; he didn't know what "the prospects of the corporation" were; he thought it had a good future, but he did not know when the "turning point" would come; the purpose for increasing the capitalization of the corporation was to eliminate indebtedness; the corporation had borrowed money from various sources to keep in operation; the bank lent "a considerable amount of money" to the corporation; he (the witness) advanced money to it at various times, and he "took" stock in the corporation for the indebtedness; it was to the advantage of the corporation to issue stock to him instead of giving him notes; he paid $53 a share (a total of $26,500) for his original 500 shares of stock in the corporation, and he paid $58.50 a share (a total of $40,950) for the 700 additional shares of stock. He testified further that the board of directors decided what salary he should receive as president of the corporation; the last time the directors voted on the matter was about 10 months before the trial, at which time they gave him a salary of $1000 a month; thereafter he (the witness) voluntarily reduced his salary to $750 a month and has received that salary ever since. He also testified that he voluntarily reduced his salary April 1, 1949; prior to that time he was drawing $1000 a month, and he drew $1000 a month during 1948 when the corporation was losing money.

The bookkeeper, who was also a director of the corporation, testified that the corporation had lost money since 1948; additional capital was obtained for the corporation in an endeavor to bring in other merchandise and increase the business; at directors' meetings, J. W. Keyston had continuously given them the benefit of his experience and they were guided largely by what he advised; and he thought J. W. Keyston had done a great deal toward dictating the policies of the corporation.

The trial court found that the allegations of the petition for removal of the trustee, to the effect that he had controlled and managed the affairs of the corporation for his own benefit and to the detriment of the beneficiaries, were untrue. It also found that the allegations contained in the current account and the amendment to the current account were true. The court made an order settling the current account as amended, allowing $850 as attorney's fees for services theretofore rendered, authorizing the trustee to sell, subject to confirmation by the court, sufficient of the Lichtenberger-Ferguson Company stock, held by him in trust, to produce not to exceed $5,500 with which to repay the corporation the amount advanced by it to the beneficiaries and to pay the attorney's fees. The court denied the petition to remove the trustee.

Appellants contend that the trustee should be removed. They argue, in substance, that his interest as an officer and director of the corporation conflicts with his trust obligations. They state in effect that, as such officer and director, he has drawn a substantial salary ($750 or $1000 per month) when the beneficiaries received little from the trust, and during the past

2–½ years when they received nothing therefrom; and that "all this" is contrary to the intentions of the testator.

[1–5] A trustee is bound to act in the highest good faith toward his beneficiary, Churchill v. Peters, 57 Cal.App.2d 521, 531, 134 P.2d 841, and the question as to whether he does so act is one of fact for the trial court. A trustee may be removed when it appears that his private interests conflict with his trust duties. Moore v. Bowes, 8 Cal.2d 162, 165, 64 P.2d 423. Whether a trustee should be removed, however, is a matter within the sound discretion of the trial court and is " 'dependent upon the circumstances of each particular case.' " Estate of Brown, 22 Cal.App.2d 480, 486, 71 P.2d 345, 348. In the case just cited, some of the beneficiaries of a testamentary trust objected to the appointment of two of the five trustees named in the will on the ground that their personal interests conflicted with the interests of the beneficiaries. The trust estate therein consisted of stock of a certain corporation. The principal asset of that corporation was stock in a second corporation. The two trustees, whose appointments were there objected to, had purchased stock in the second corporation from the testator and had given him their notes (which had not become payable at the time of his death) secured by a deposit of the said stock purchased. The court therein held that it did not appear that there was such a conflict as to disqualify said trustees as a matter of law. It was stated therein, 22 Cal.App. 2d at page 485, 71 P.2d at page 348, that their "appointment was desired by the testator with a full knowledge of all of the essential facts." It was stated further (same pages) that a court "has a large discretion in such matters", and that the real question is whether a "disqualification so clearly appears that it must be said that the court abused its discretion." It was also stated therein, 22 Cal.App.2d at page 486, 71 P.2d at page 348 (in quoting Rest., Trusts, sec. 107): " 'The court will less readily remove a trustee named by the settlor than a trustee appointed by the court * * *. The court will not ordinarily remove a trustee named by the settlor upon a ground existing at the time of his appointment and known to the settlor and in spite of which the settlor appointed him, although the court would not have appointed him trustee.' " As above shown, the trustee was an officer and a director of the corporation during the lifetime of the testator. It appears that when the testator executed his will and named Donald as trustee, he did so with the knowledge that Donald then owned 500 shares of stock in the corporation and that by giving the stock to him in trust Donald would have control of all the stock of the corporation. It would therefore seem that the testator intended that, upon his death, Donald should have control of the corporation. The appellants herein also assert that the trustee, by increasing his holdings, violated "the rule of undivided loyalty," and created conflicting interests. Prior to the time the additional stock was issued to him, he was, as above shown, a stockholder, the president, and a director of the corporation, and he had control of 1750 shares of stock, which was all the stock of the corporation except 200 shares. He testified regarding the condition of the trust estate and the corporation. The bookkeeper also testified regarding the history and the financial condition of the corporation. Counsel for appellants stated at the hearing that there was not "any question of dishonesty here at all." The evidence was legally sufficient to support the order denying the petition to remove the trustee.

[6, 7] Appellants contend further that the account and the amended account should be disapproved. They argue that the trustee should be compelled to explain why he permitted the trust estate to "deplete" in value, and why, since the corporation was losing money, he made no attempt to dispose of the corpus and reinvest the sums thereby realized. They argue further that, since the "trust was the majority stockholder, financial statements of the corporation should have been submitted with the account so as to determine why the trust fund was not productive of any income." Those arguments pertain principally to the matter of management of the corporation rather than to an accounting by

the trustee. It is to be noted, however, that the account as originally rendered was very general in form. It merely recited, with respect to income received by the trustee, that during each of the years 1946, 1947, 1948, and 1949, a certain sum was received from the corporation; that in 1949 a certain sum was received as an income tax refund; that a certain sum was received from Alfred's estate. The total of receipts was $10,345.93. As to disbursements, the account merely recited that during each of those years just mentioned a certain sum was paid to Mrs. Keyston for the use of the beneficiaries; and that in each of said years a certain "Accounting analysis charge" had been made by a bank. The total amount of disbursements was $10,331.84. ($10,314.68 paid to Mrs. Keyston, and $17.16 paid to the bank.) It was not specified in the account whether the amounts paid to Mrs. Keyston represented dividends on the stock of the trust estate or whether the amounts were "advances." After the beneficiaries had filed their objections to the account and had filed their petition for the removal of the trustee, the trustee filed an amendment to his account wherein he stated that in his account he had reported that $10,314.68 had been paid to Mrs. Keyston, and that included in said sum was the sum of $4,150 which "is an advance of principal" to her. In that amendment he asked that an order be made authorizing him to sell such stock of the trust estate as might be necessary to reimburse the corporation for the "advance of principal" and to pay attorney's fees and costs. (In said amendment the trustee asked that the court allow him $2,500 for attorney's fees and costs in the matter of an appeal that the beneficiaries had taken in a certain action against the trustee.) It thus appears that the trustee omitted a very substantial item in his account as originally rendered, that he did not prepare his account carefully or with the intention of conveying specific information as to each amount paid as a dividend or as an advancement. The account does not recite expressly how much was paid as dividends, and that amount cannot be determined from the account except by deducting the amount of "advances" (referred to in the amendment) from the total of the various amounts paid to Mrs. Keyston as shown in the original account. The trustee should have rendered an account which stated specifically the amounts that were paid as dividends or advances, and should have stated the dates when such payments were made. In view of the fact that one of the beneficiaries was a minor, it was especially important that the account be specific. At the hearing the trustee testified that the various dividends received by him from the corporation in 1946 were as follows: $937.50; $250; $687.50. He testified that in 1947 he received dividends therefrom as follows: $937.50; $600; $337.50; $600; $337.50. He was then asked by his counsel if he received dividends from the corporation in 1948. He replied: "This doesn't particularly indicate whether it was dividends or not. I believe that is when we started advancing." With respect to that question, he also said: "As far as I can determine from my records, it is an advance now." Then he testified that in 1948 he received the following amounts: $400; $250; $250; $250; $275; $275; $275; $275; $275; $275; $275; $275. As to the year 1949, he testified that he received additional advances as follows: $275; $275; $250. The total of the amounts received by the trustee in 1946, as shown by his testimony above, is $1,875, which is the same amount that, according to his account, he paid to Mrs. Keyston in 1946. The total of the amounts received in 1947, as shown by his testimony above, is $2,812.50, which is the same amount that, according to his account, he paid to her in 1947. The total of the amounts received by him in 1948, as shown by his testimony, is $3,350, which is $225 more than the amount ($3,125) which, according to his account, he paid to her in 1948. The total of the amounts received by him in 1949 from the corporation, as shown by his testimony above, is $800. He also testified that he received $964.68 as a tax refund. The total of these two items is $1,764.68. In his account, he stated that in 1948 he paid her $1,964.68. It thus appears, according to his testimony, that he paid her $200 less than the amount stated in his account. It appears also that the trustee's testimony as to when he commenced to make the advance payments was indefinite. If he was correct in asserting that he commenced to make such payments in 1948, then it appears, according to his testimony, that he paid $3,350 in 1948 and $800 in 1949 or a total of $4,150. It appears, according to his account, that in 1948 he paid $3,125, and, according to his oral explanation of the 1949 item of $1,964.68, as shown in his account, he paid $1,000 in 1949 (since he explained that $964.68 was a tax refund) or a total of $4,125. In other words, he testified that he paid $3,350 in 1948 and $800 in 1949, and his account shows (with his explanation of the 1949 item) that he paid $3,125 in 1948 and $1,000 in 1949. The differences as to amounts paid, as shown by the trustee's account and his testimony, are not reconcilable. The record does show that counsel for the beneficiaries said that they were not objecting to the propriety of advance payments by the corporation. That statement is to be interpreted as meaning that no question was raised regarding the right of the corporation to make such payments. It is not to be assumed, however, that by reason of such statement a correct accounting as to those payments would not be required. The order settling the account and the account as amended was a general statement to the effect that the account and the "Amendment" be and the same "is allowed and settled" (except that an item of $12 advanced as costs was reduced to $6.00). The order did not purport to be a statement of the charges against the trustee or of credits to which he was entitled, except by said general reference allowing and settling the account. The evidence did not support the order settling the account. The order should be reversed, and the trustee should be required to render a specific and correct account.

[8] According to testimony on behalf of the trustee, the value of the legal services rendered in preparing the account was $100, and the value of the legal services in appearing at the hearing and various continuances was $750. In view of the general and inaccurate account rendered and the allegedly poor financial condition of the business, the amount of $850 allowed for attorney's fees was excessive.

[9] As above stated, the court made an order authorizing the trustee to sell, subject to confirmation, sufficient stock "to produce not to exceed $5,500" in order to reimburse the corporation for money advanced and to pay attorney's fees. The order was not sufficiently definite as to the number of shares of stock to be sold, and it failed to state a minimum price for which a share might be sold. The appraised value of the 1250 shares of stock, according to the account, is $81,250 or $65 per share. The trustee testified that he paid $58.50 a share for the additional 700 shares of stock he purchased. He also testified that the stock was worth "probably 50 some-odd dollars a share." A statement was made at the hearing, on behalf of the trustee, that the stock was not listed and it would be difficult to sell it. In view of the circumstances just mentioned, and in view of the controversy that has arisen between the trustee and the beneficiaries, an order permitting the sale of stock for the aforesaid purposes should be definite as to a maximum number of shares to be sold and the minimum price per share.

[10] At a hearing herein upon a further account the beneficiaries should be permitted to inquire fully concerning the manner in which the trustee paid the $22,000 which the corporation owed to Alfred Keyston. The judge herein did permit some questions regarding this matter to be answered, but he stated that he believed the matter was immaterial to the issues herein. The trustee testified, regarding the payment of said indebtedness, that he purchased 500 shares of stock in January, 1943, at $53 per share or a total of $26,500 and that with the proceeds of that purchase the corporation paid a part of its indebtedness to Alfred. The bookkeeper for the corporation testified that the indebtedness was paid in April, 1943, by Donald "assuming the indebtedness of his brother, and stock was issued for the value, plus additional money, and also additional money that we owed to Mr. Keyston [Donald]"; that the indebtedness was transferred so that Donald would owe the money to his brother, and the corporation became indebted to Donald. It seems from the testimony of the trustee that the corporation

paid Alfred, but according to testimony of the bookkeeper it seems that Donald agreed to pay the corporation's indebtedness to Alfred in consideration of the transfer of stock by the corporation to Donald. Of course, as argued by the trustee, this is not a proceeding to determine whether Donald is indebted to Alfred's estate. Upon the question, however, as to the corporation's ability to pay dividends it is material to know whether its indebtedness of $22,000 has been paid.

The order denying the petition to remove the trustee is affirmed. The order settling the account and amended account is reversed, with the direction that the superior court order the trustee to render an account which recites specific information regarding the dividends and the advance payments. The order allowing attorney's fees is reversed, with the direction that the superior court reconsider and determine the matter of reasonable attorney's fees upon the hearing of a further account. The order authorizing the trustee to sell stock to reimburse the corporation and pay attorney's fees is reversed, with the direction that the superior court reconsider and determine that matter upon the hearing of a further account.

SHINN, P. J., and VALLÉE, J., concur.

DE LAO v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 18212.

District Court of Appeal, Second District,
Division 1, California.

Feb. 6, 1951.

As Modified on Denial of Rehearing
March 6, 1951.

Hearing Granted April 2, 1951.*

Proceeding by David Daniel De Lao against the Superior Court of the State of California, in and for the County of Los Angeles, to review order vacating purported judgment against David Daniel De Lao. The District Court of Appeal, Drapeau, J., held that, where jury was waived and trial judge announced his decision and directed that findings of fact be prepared, served and filed, an order vacating purported judgment which was signed, filed and entered without findings having been prepared or presented to judge was within the judge's power to make without giving notice to opposing counsel.

Order affirmed.

1. Judgment 🔑363, 388

A court has inherent power to set aside a judgment made through inadvertence, and in such a case notice to opposing counsel is not required.

2. Judgment 🔑388

Where jury was waived and trial judge announced his decision and directed that findings of fact be prepared, served and filed, an order vacating purported judgment which was signed, filed and entered without findings having been prepared or presented to judge was within the judge's power to make without giving notice to opposing counsel.

◆

David G. Kling, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

DRAPEAU, Justice.

Petitioner for writ of review was defendant in an action tried in the Superior Court. A jury was waived; the trial judge announced his decision, and directed that findings of fact be prepared, served and filed.

By way of return to the writ issued herein respondent court filed a general demurrer challenging the sufficiency of the facts stated to entitle petitioner to the relief prayed for.

In the trial court no findings were prepared or presented to the judge. Notwithstanding this, judgment against the defendant was signed, filed and entered.

When this situation was brought to his attention, the judge made an order vacating the purported judgment. He also ordered that defendant's motion for a new trial from that judgment go off calendar.

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* Subsequent opinion 234 P.2d 961.

Thereafter findings were made, served and filed, and judgment followed. From this judgment defendant appealed, after his motion for a new trial was denied.

Defendant complains that the motion vacating the first judgment was made without notice to him, and argues that in any event the court had no power to make the order.

[1] All that happened was that the court exercised its inherent power to set aside a judgment made through inadvertence. Phillips v. Trusheim, 25 Cal.2d 913, 156 P.2d 25; Raines v. Damon, 89 Cal.App.2d 812, 201 P.2d 886.

In such cases no notice to opposing counsel is required.

[2] No substantial right of defendant has been in any manner trenched upon.

The demurrrer is sustained, the writ heretofore issued is discharged.

WHITE, P. J., and DORAN, J., concur.

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102 Cal.App.2d 141

POTTER et al. v. CITY COUNCIL OF CITY OF PORT HUENEME et al.

Civ. 18218.

District Court of Appeal, Second District, Division 1, California.

Feb. 5, 1951.

As Modified on Denial of Rehearing Feb. 26, 1951.

Hearing Denied April 2, 1951.

James T. Potter, and others, petitioners, brought original mandamus proceedings against the City Council of the City of Port Hueneme and others, respondents, to prevent city council from adopting an ordinance annexing a federal military reservation. The District Court of Appeal, Doran, J., held that mandamus would not lie.

Alternative writ of mandate discharged, proceeding dismissed, and peremptory writ denied.

1. Mandamus 🔑10, 12

To authorize issuance of writ of mandamus, there should not only be want of specific legal remedy, but also there should be a specific legal right, and the parties sought to be coerced must be bound to act, and if existence of right is doubtful, the writ will be denied.

2. Mandamus 🔑23(1)

Generally, a private individual may apply for mandamus only in those cases where he has some private or particular interest to be subserved, or some particular right to be preserved or protected by the writ, independent of that which he holds with the public at large, and unless such special right is made to appear, application should be denied.

3. Mandamus 🔑78

Citizens and taxpayers of county were not entitled to mandamus to prevent city council from adopting an ordinance annexing Federal Military Reservation against will of the National Government, pursuant to uninhabited area annexation provisions of statute. Government Code, §§ 35300–35325.

4. Mandamus 🔑10

Where existence of a right is doubtful, writ of mandamus will be denied.

◆

Warner & Jackson, Los Angeles, for petitioners.

Jerome H. Berenson, Oxnard, for respondents.

DORAN, Justice.

The petition herein sets forth that the respondent City of Port Hueneme in Ventura County, "is adjacent and west of the City of Oxnard, and adjoins the military reservation and installations of the United States Navy and * * * Coast Guard on its north and west boundaries"; that the Coast Guard has owned and operated said reservation of 43 acres for over 50 years, "at which time exclusive federal jurisdiction was ceded by the State of California to said area"; that prior to 1943, the United States Navy acquired 1,577 acres of land in said area, and developed various naval installations known as Port Hueneme, to which parcel California likewise ceded "exclusive territorial jurisdiction".

It is further stated that previous to November, 1939 some 250 acres of said 1,577 acre parcel were then a part of the City of Oxnard, and that on September 26, 1939, a petition was signed by 77 citizens of the Port Hueneme area, including respondents Bert N. Dahl, Mayor, and Oran W. Brown, past mayor and present member of the Port Hueneme City Council, and filed with the City of Oxnard, representing that "if said harbor area were excluded from the City of Oxnard for the purpose of including the said harbor area within the Oxnard Harbor District, that the * * * 77 signers would oppose any attempt by any municipality to annex said harbor area for twenty-five (25) years thereafter"; that acting upon said solemn written pledged word * * * the City of Oxnard did exclude said harbor area from the City of Oxnard", and that the United States "in reliance upon said status, accepted exclusive jurisdiction over said lands", and expended in excess of $38,000,000.00 in developing such harbor.

Petitioners further allege that on March 30, 1949, the respondent Port Hueneme City Council "commenced formal consideration of a proposed ordinance to annex the said naval reservation and * * * coast guard reservation into the newly incorporated City of Port Hueneme, pursuant to Section 6, Act 5162, Deering's General Laws of the State of California, on the assertion that said reservations were uninhabited areas", which ordinance was protested by the Navy, Coast Guard, and others. The original ordinance was then abandoned, and a resolution adopted declaring an intention to annex said reservations "together with a sixty (60) foot strip of territory owned by the Berylwood Investment Company, consisting of 7.32 acres, adjacent to the western boundary of said naval reservation". It is alleged that said 60 foot strip was included "as a subterfuge for the purpose of avoiding the legal objections and protests" made by the Navy, Coast Guard and others. The petition then avers that the proposed amended annexation just mentioned was likewise protested; that such protests were denied by the City Council and a second reading of the ordinance set for November 1, 1950; that unless restrained the Council would adopt said ordinance. An Alternative Writ of Mandate was issued.

It is claimed by petitioners that adoption of such an ordinance would be illegal and in violation of the federal and state constitutions; that it would conflict with "the exclusive grant of jurisdiction" ceded to the Navy and Coast Guard by conferring control of the harbor to the City of Port Hueneme "in regard to merchant shipping, and civilian use". It is likewise contended that said ordinance would subject "commercial ships and supplies entering said harbor to taxation, civilian labor regulations and other police power" of said city. Other claims made are that the ordinance subjects "civilian employees of the Naval Station * * * to a (city) payroll tax" and perhaps other local taxes; that it "depreciates the commercial value of the Naval and Coast Guard reservations; that it "interferes with the civilian employment" by the Navy by subjecting personnel to tax and police powers of the city. It is also insisted that such ordinance would subject the Navy and Coast Guard "to the burdensome responsibility of enforcing" city ordinances. The statement is made, however, that these contentions are in part based upon "potential ordinances that the City of Port Hueneme would be empowered to legislate in the event" the ordinance were adopted.

The claim is also made that the ordinance would be illegal and in violation of Section 5005, California Harbors and Navigation Code, prohibiting inclusion of lands located in a harbor district; that the inclusion of the 60 foot strip heretofore mentioned and the omission of a 62 acre portion of the naval station were for the purpose of circumventing the law and "to develop said plan of annexation" by "gerrymandering". By the present mandate proceeding petitioners seek to prevent the adoption of the annexation ordinance.

The basic question is stated to be "whether or not, a city may annex federal military reservations against the will of the national government, pursuant to the uninhabited area annexation provisions of Sections 35300 to 35325, California Government Code". Cited in support of this proposition is American Distilling Co. v. City Council of City of Sausalito, 1950, 34 Cal.2d 660, 213 P.2d 704.

Respondents have filed a demurrer alleging that the petition is uncertain in respect to the claimed invalidity of the proposed ordinance, and contend that the named petitioners having no other interest than as taxpayers and citizens, have not sufficient beneficial interest to maintain this proceeding. By answer respondents deny the material allegations of the petition and assert that there is no showing of illegality in the proposed ordinance.

Attention is called to the fact that on June 7, 1950, petitioners filed a similar petition for mandamus in the Superior Court of Ventura County; that on October 20, 1950 the alternative writ was quashed, respondents' demurrer sustained and petitioners given 10 days to file an amended petition; that no amended petition was filed, but that the present proceeding was then instituted in the District Court of Appeal.

[1, 2] As noted in respondents' brief, the rule as set forth in 16 Cal.Jur. Section 6, page 767, requires that "to authorize the issuance of the writ (of mandamus) there should not only be want of specific legal remedy, but also there should be a specific legal right; the party sought to be coerced must be bound to act. If the existence of the right is doubtful, the writ will be denied". On page 853 of the same citation occurs the following: "It is a settled general rule that a private individual may apply for this remedy only in those cases where he has some private or particular interest to be subserved, or some particular right to be preserved or protected by the writ, independent of that which he holds with the public at large". Unless this special right is made to appear, the application should be denied.

The above rule finds application in the recent case of American Distilling Co. v. City Council of City of Sausalito, 34 Cal. 2d 660, 213 P.2d 704, 709, cited by both parties hereto, where the court says: "A sufficient showing of beneficial interest and of damages which might ensue * * * was disclosed when it appeared that the petitioner was the owner of the property proposed to be annexed illegally". It is to be noted that no such showing has been made in the instant case. Indeed, petitioners most serious concern would seem to be that by enactment of the proposed ordinance, the supremacy and exclusive jurisdiction of the United States might be unduly interfered with.

Petitioner James T. Potter is merely alleged to be "a land owner, taxpayer and elector of said County of Ventura"; petitioner A. A. Ranni "is a land owner, taxpayer and elector of said City of Port Hueneme". It is alleged that "Oxnard Harbor District has a substantial outstanding bonded indebtedness, approximating which bonded indebtedness upon the lands of petitioners * * *; that the United States Navy leases Pier No. 1 to Oxnard Harbor District, and from the revenue thus derived, retiring said bonds together with the money received from the United States Navy; that by reason thereof, petitioners have a beneficial interest in said annexation and the continued harmonious relations between the United States Navy and the Oxnard Harbor District and Ventura County".

It is suggested in respondents' brief that although the petition shows no well defined legal or special interest, petitioners' theory may be that the question involved "is one of public right and the object of mandamus is to procure the enforcement of a public duty" in which case petitioners might be deemed sufficiently interested as citizens and taxpayers. That this modification of the general rule is applicable in certain cases cannot be doubted. However, as pointed out by respondents, such modification, permitting petitioners to act in a representative capacity, apparently "applies only in cases where a power or duty is imposed by law or statute upon a public board or officer and it or he refuses to carry it out".

In the instant case petitioners are attempting to challenge the validity of a legislative act rather than seeking to enforce a definite public duty enjoined by law. In such a situation it was certainly petitioners' duty to make a clear showing that respondents either acted without power or failed to obey statutory provisions relating to annexation. Unless there be such a showing, there should be no judicial interference with legislative process. Whether the legislation is wise or unwise is, of course, not a matter for discussion.

The American Distilling Co. v. City Council of City of Sausalito, 34 Cal.2d 660, 213 P.2d 704, 707, previously mentioned, involved the same Annexation Act here under consideration, found in 2 Deering's General Laws, Act 5162, and as said in that case, "the statute constituted the measure of the power to be exercised by the city council". That act makes no distinction between publicly and privately owned land; it is therefore obviously beyond the jurisdiction of a judicial body to read into such act by construction or otherwise, any such distinction.

The allegations of the petition that the proposed enactment will interfere with federal control are but conclusions of a speculative nature. Although petitioners' concern in behalf of the federal government and its naval and coast guard forces is commendable, such allegations in the present proceeding and in the absence of a more specific factual showing add nothing to the legal force of the petition. The same may be said in respect to the assertions that a certain 60 foot strip was fraudulently included in the annexation proceedings as a "subterfuge" to bring the matter within the law, which at most amount to mere conclusion.

[3, 4] Much of the petition relates to matters of speculative nature and remote possibilities which can hardly furnish authority for judicial interference by way of mandate. Petitioners' alleged "beneficial interest" is at best of a general nature in no manner comparable with that which existed in the American Distilling Co. case relied upon. In short, petitioners, seeking this writ, which is by no means a matter of right, have fallen far short of presenting such a definite state of affairs as would justify the relief sought. It is fundamental that where the existence of the right is doubtful, the writ will be denied.

The alternative writ of mandate is discharged, the proceeding dismissed and the peremptory writ prayed for is denied.

WHITE, P. J., and DRAPEAU, J., concur.

102 Cal.App.2d 195

SILVER'S LIQUOR STORES, Inc. v. CREEDEN.

Civ. 17720.

District Court of Appeal, Second District, Division 2, California.

Feb. 8, 1951.

Rehearing Denied Feb. 26, 1951.

Hearing Denied April 5, 1951.

Silver's Liquor Stores, Inc., a corporation, brought an action against L. E. Creeden for cancellation of a lease of store entered into before city caused a bridge to be constructed near the rented store which cut off previously existing access to store from highway and almost totally blocked view of store from highway, and defendant filed a cross-complaint. The Superior Court of Los Angeles County, Percy Hight, J., rendered a judgment for defendant on the complaint and for the defendant on his cross-complaint and plaintiff appealed. The District Court of Appeal, McComb, J., held that evidence sustained the findings.

Judgment affirmed.

1. Landlord and tenant ⇨28(1)

In action brought on ground of misrepresentation, for cancellation of a lease of store entered into before city caused a bridge to be constructed near rented store which cut off previously existing access to store from highway and almost totally blocked view of store from highway, evidence sustained finding that at the time, and prior to the time the lease was entered into, defendant represented to plaintiff that a bridge was to be placed near store.

2. Landlord and tenant 🔑28(1)

In action brought on ground of misrepresentation, for cancellation of lease of store entered into before city caused bridge to be constructed near rented store which cut off previously existing access to store from highway and almost totally blocked view of store from highway, evidence sustained finding that defendant did not represent to plaintiff that bridge would in no way interfere with access to or from store.

3. Landlord and tenant 🔑28(1)

In action brought on ground of misrepresentation, for cancellation of a lease of store entered into before city caused a bridge to be constructed near rented store which cut off previously existing access to store from highway and almost totally blocked view of store from highway, evidence sustained finding that, prior to entering into lease, defendant was not informed that property would be condemned.

4. Landlord and tenant 🔑28(1)

In action brought on ground of misrepresentation, for cancellation of a lease of store entered into before city caused a bridge to be constructed near rented store which cut off previously existing access to store from highway and almost totally blocked view of store from highway, evidence sustained finding that prior to time lease was entered into, defendant had been informed that city and county planned to erect a bridge, approach to which would be directly in front of premises on which store was located.

5. Landlord and tenant 🔑28(1)

In action brought on ground of misrepresentation, for cancellation of lease of store entered into before city caused bridge to be constructed near rented store which cut off previously existing access to store from highway and almost totally blocked view of store from highway, evidence sustained finding that, prior to time lease was entered into, defendant was not informed that erection of bridge would render it impossible or extremely difficult to gain access to or from premises on which store was located.

6. Landlord and tenant 🔑28(2)

In action brought on ground of misrepresentation, for cancellation of a lease of store entered into before city caused a bridge to be constructed near rented store which cut off previously existing access to store from highway and almost totally blocked view of store from highway, evidence sustained finding that defendant had not fraudulently or falsely withheld from plaintiff, with intent to deceive plaintiff, information relating to bridge.

7. Landlord and tenant 🔑28(2)

In action brought on ground of misrepresentation, for cancellation of a lease of store entered into before city caused a bridge to be constructed near rented store which cut off previously existing access to store from highway and almost totally blocked view of store from highway, evidence sustained finding that it was not true that if plaintiff had known of such facts, plaintiff would not have entered into lease, and that it was not true that defendant knew that plaintiff would not have had entered into lease had plaintiff known such facts.

8. Landlord and tenant 🔑28(1)

In action brought on ground of misrepresentation, for cancellation of a lease of store entered into before city caused a bridge to be constructed near rented store which cut off previously existing access to store from highway and almost totally blocked view of store from highway, evidence sustained finding that fraudulent representations regarding premises on which store was located, did not render rented premises unfit for use by plaintiff for a store.

9. Landlord and tenant 🔑28(1)

In action brought on ground of misrepresentation, for cancellation of lease of store entered into before city caused bridge to be constructed near rented store which cut off previously existing access to store from highway and almost totally blocked view of store from highway, evidence sustained findings that it was not true that plaintiff, relying upon representations of defendant, made extensive preparations for opening of store on specified date, or that, by reason of fraudulent representations by defendant, plaintiff was forced to cancel plans, or that plaintiff had been damaged by reason of fraudulent representations by defendant.

10. Appeal and error ⟹1010(1)

Where findings of trial court were supported by evidence even though contrary findings might have been supported, District Court of Appeal was bound by findings.

◆

Riedman & Silverberg, Long Beach, for appellant.

Cree & Brooks, Long Beach, for respondent.

McCOMB, Justice.

Plaintiff appeals from a judgment in favor of defendant refusing to decree the cancellation of a lease of real property on the ground of misrepresentation.

Facts: Defendant owned a building at 1292 West Willow Street, Long Beach, California. In October, 1946, the building fronted on Willow Street and had full and free access for both automobile and foot traffic.

In October of 1946, defendant leased the building to plaintiff for a period of five years for a total rental of $9,000, the lease to commence on February 1, 1947. The date of commencement was extended to March 15, 1947, because defendant could not give possession.

Prior to making the lease defendant had been informed that the City of Long Beach intended to erect a bridge with approaches which would affect defendant's property.

After the lease was entered into, and before plaintiff took possession, the City of Long Beach caused to be constructed a bridge somewhat east of the store, the bridge being so constructed as to effectively cut off all access to and from said store from the highway and almost totally blocking the view of the store from the highway.

Plaintiff instituted the present action claiming that defendant had misrepresented that there would be free access to the store; that there would be parking in front of the store on the street; and that the proposed bridge would not adversely affect the premises.

Defendant filed a cross-complaint seeking the amount of rental due under the lease. The trial court gave judgment in favor of defendant on the complaint and in favor of defendant on his cross-complaint.

[1-8] Plaintiff's contention that the following findings of fact are not supported by substantial evidence is without merit:

1. "That it is true that at the time, and prior to the time the said lease was entered into, the defendant and cross-complainant represented to the plaintiff and cross-defendant that a bridge was to be placed near the said premises."

This particular finding is supported by the allegation in paragraph I of plaintiff's complaint.

2. "That it is not true that the defendant and cross-complainant represented that the said bridge would in no way interfere with access to or from said premises."

This finding is supported by defendant's testimony wherein defendant stated that he did not tell plaintiff that the bridge was going to terminate at Fashion and Willow but that if there was any information about it, it could be obtained from the City Hall.

3. "That it is not true that, prior thereto, defendant and cross-complainant was informed that the said property would be condemned."

The record is devoid of any evidence that a condemnation proceedings had been instituted or was known to defendant.

4. "That it is true that, prior thereto, the defendant and cross-complainant had been informed that the City of Long Beach and County of Los Angeles had planned to erect a bridge, the approach to which would be directly in front of the said premises."

Three witnesses testified to the foregoing fact which supports such finding.

5. "That it is not true that, prior thereto, the defendant and cross-complainant was informed that the erection of the said bridge would render it impossible or extremely difficult to gain access to or from the said premises."

The evidence discloses that defendant relied upon the statements of the city manager of the City of Long Beach as shown in a letter from him reading thus: "This matter has been reviewed carefully by our Engineering Department and our appraiser and it is our belief that there will be little if any damage to your property resulting from this improvement."

6. "That it is not true that the defendant and cross-complainant fraudulently and/or falsely withheld from the plaintiff and cross-defendant, with intent to deceive plaintiff and cross-defendant, such information."

There was absolutely no proof of any fiduciary relationship between the parties. Therefore the above finding is supported.

7. "That it is not true that the plaintiff and cross-defendant was in fact so deceived."

Since the record fails to disclose that defendant made any misrepresentations to plaintiff the foregoing finding is supported by the evidence.

8. "That it is not true, that if the plaintiff had known such facts he would not have entered into the said agreement of lease; and that it is not true that the defendant well knew that the plaintiff would not have entered into the said agreement had he known such facts."

The record is susceptible to interpretation that plaintiff knew all the facts which were known to defendant. Therefore the foregoing finding is correct.

9. "That it is not true that by reason of fraudulent representations regarding the said premises, the said premises were rendered utterly unfit for use by plaintiff for a store of any kind."

[9] The witness Lankford gave testimony which if believed by the trial court gave rise to an inference which would support the foregoing finding. An analysis of the testimony of defendant would support an inference sustaining the foregoing finding. The record disclosed ample evidence to support a finding that the premises had not been rendered unfit for a store of any kind.

10. "That it is not true that the plaintiff, relying upon representations of the defendant, made extensive preparations for the opening of the store in the said premises on the first day of May, 1947; that it is not true that, by reason of fraudulent representations by the defendant, plaintiff was forced to cancel such plans. That it is not true that the plaintiff has been damaged by reason of fraudulent representations by the defendant."

The testimony fails to show any extensive preparations made by plaintiff for opening a store on the leased premises.

[10] In view of the fact that the trial court's findings are supported by evidence even though contrary findings might have been supported, this court is bound by the action of the trier of fact.

Affirmed.

MOORE, P. J. and WILSON, J., concur.

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102 Cal.App.2d 166

DOWNEY PLUMBING CO., Inc. v. SECREST CONST. CO.

Civ. 17774.

District Court of Appeal, Second District,
Division 3, California.

Feb. 5, 1951.

Downey Plumbing Company, Inc., a California corporation, brought an action against Secrest Construction Company, a California corporation, to recover balance alleged to be due on contracts for services and materials. Defendant pleaded a counterclaim, which it subsequently abandoned during trial. The Superior Court of Los Angeles County, Ben R. Hagain, J., rendered judgment for plaintiff, and denied defendant's motion for a new trial, and the defendant appealed. The District Court of Appeal, Vallée, J., held that evidence was sufficient to support finding that floor furnaces were not included in the plumbing contract.

Judgment affirmed.

1. Appeal and error ⟹110, 782

An order denying a motion for a new trial is nonappealable, and an appeal therefrom will be dismissed.

2. Contracts ⟹175(3)

In action to recover balance due on plumbing contract for services and materials, evidence supported finding that floor furnaces were not included in the contract.

3. Trial ⟹413

Where defendant at trial stated it would abandon its counterclaim, he waived error by court in sustaining objections to questions propounded by defendant in an effort to prove allegations of counterclaim.

◆

Harold Richardson, Whittier, for appellant.

Frank C. Nimocks, Downey, for respondent.

VALLÉE, Justice.

[1] Appeal by defendant from an adverse judgment in an action to recover the balance alleged to be due on contracts for services and materials. Defendant also appealed from an order denying its motion for a new trial. The latter order is nonappealable and the appeal therefrom will be dismissed.

Plaintiff and defendant entered into an oral contract by which plaintiff agreed to install the plumbing in 18 houses under construction by defendant at $810.25 a house. The plumbing was installed as agreed. The controversy is as to whether floor furnaces were included in the plumbing contract. Plaintiff alleged, and the court found, that the parties entered into one contract covering the installation of the plumbing which did not include the floor furnaces and a separate oral contract covering installation of the floor furnaces.

[2] Defendant contends that the evidence is insufficient to support the finding that the floor furnaces were not included in the plumbing contract. Plaintiff first bid $960 a house, including all plumbing and heating according to plans and specifications. Defendant's representative told plaintiff's representative that the bid was too high and that if he wished to submit another bid to cut it to "necessities for a bare plumbing job." Plaintiff submitted another bid of $810.25 in writing which covered plumbing only. Thereafter defendant prepared a written purchase order from plaintiff's second bid and submitted it to plaintiff. Neither plaintiff's bid nor the purchase order contained any reference to floor furnaces. Later, after conversations between representatives of plaintiff and representatives of defendant, the former began installation of the floor furnaces.

Plaintiff billed defendant as follows: "For 18 Furnaces @ $125.00 installed ....$2250.00 75% of $2250.00.... $1687.50........ First Payment on Heating $1687.50." The bill was paid. Later plaintiff billed defendant for the balance due on the floor furnaces together with the balance due for installing the plumbing. There was evidence that in the trade there is a distinction between "plumbing" and "heating"; that the terms are not synonymous; and that one does not include the other.

Defendant argues that the court erred in not accepting the testimony of three of its witnesses as to the terms of the oral contract, which testimony it claims was not impeached or contradicted. One of these witnesses, qualified as an expert, testified that the reasonable value of material and labor for installing the plumbing and floor furnaces was $850.50, from which fact, so defendant claims, it must have been inferred that the floor furnaces were included in plaintiff's bid of $810.25. Another of these witnesses, Mr. Young, testified that he was defendant's superintendent in the construction of the houses; that he had a conversation with Mr. Campbell, plaintiff's representative, on the day construction began, in which he asked Campbell for the heater-opening sizes so that he could proceed with the sub-flooring, and that Campbell said he would be back with them the next day; that he received the heater sizes the next day; and that later Campbell told him the "heater-opening sizes" would have to be changed, and gave him another figure. This witness also testified that prior to the time plaintiff installed the floor furnaces he asked Campbell "on several occasions when they [the floor furnaces] were coming and he told me not to get in such a hurry," that defendant did not have them on the purchase requisition; that he told Campbell "he had better get that thing straightened out." Campbell's testimony was to the effect that he gave Young only one set of standard measurements for floor furnaces and that he told Young at the time that the furnaces were not in the contract. The third of these witnesses, Mr. Whitney, estimator for defendant, testified that while construction was in progress he had a conversation with Campbell in which the latter "ribbed" him because of the fact that we left the heaters out in writing the order"; that Campbell said "if Mr. Alexander [president of plaintiff] had wished to, he would not have to put the heaters in" and "Q. What else was said? A. I said, 'Well, that would be a heck of a way to do business.' He said, 'It would be, but we are going to put them in.'" Campbell testified that the only conversation he had with Whitney was to tell him that "the question of furnaces had arisen and I [Campbell] had checked our purchase order; that our purchase order did not call for furnaces." The testimony of these witnesses merely created a conflict for the trial judge to resolve. The contention that the evidence is insufficient to support the finding that the floor furnaces were not included in the plumbing contract cannot be sustained.

[3] Defendant pleaded a counterclaim in which it was alleged that after the work was completed, defendant discovered "latent defects" in plaintiff's installation. The court, erroneously we think, sustained objections to questions propounded by defendant in an effort to prove the allegations of the counterclaim. Error is assigned. Defendant waived the error. At a later stage in the trial its counsel stated to the court, "We will abandon the counterclaim, if the Court please."

The judgment is affirmed. The appeal from the order denying a new trial is dismissed.

SHINN, P. J., and WOOD, J., concur.

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102 Cal.App.2d 169

ELBERT, Limited, v. ALEINICK et al.

Civ. 17711.

District Court of Appeal, Second District, Division 1, California.

Feb. 6, 1951.

Hearing Denied April 2, 1951.

Elbert, Limited, brought action against I. Aleinick, Thelma H. Davis and others, to quiet title to real property, plaintiff's title being based on tax deeds. A judgment for plaintiff was entered in the Superior Court of Los Angeles County, Otto J. Emme, J., and the defendant Thelma H. Davis alone appealed. The District Court of Appeal, White, P. J., held that tax deeds obtained from state eliminated claim against properties by holder of two notes secured by deeds of trust upon the properties involved, notwithstanding that holder of notes and deeds of trust had secured them prior to time that holder of tax deeds had obtained any interest in the properties.

Judgment affirmed.

Taxation ⚿784

Tax deeds obtained from state eliminated claim against properties by holder of two notes secured by deeds of trust upon the properties involved, notwithstanding that holder of notes and deeds of trust had secured them prior to time that holder of tax deed had obtained any interest in the properties. Revenue and Taxation Code, §§ 3520, 3712.

◆

L. E. Dadmun, Los Angeles, for appellant.

John F. Bender, G. Loshoncy, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff brought an action to quiet title, its title being based upon tax deeds. Defendant and appellant Thelma H. Davis filed an answer asserting that she was the owner of two promissory notes secured by deeds of trust upon the two parcels of property involved, acquired by her "prior to the time that said plaintiff obtained any interest" in such properties. Upon the trial plaintiff introduced in evidence deeds to the State of California and deeds from the State of California to plaintiff. Defendant and appellant introduced no evidence.

It is urged on this appeal that appellant was entitled to "have a provision in the judgment that the notes would have to be paid before plaintiff in this action was entitled to have a judgment quieting title"; that the court erred in failing to find on this issue; that no relief can be granted in a quiet title action without first paying any mortgage remaining unpaid; and that the court erred "in permitting plaintiff to introduce documentary evidence as well as oral evidence in establishing its title." These contentions are patently without merit.

Appellant made no attempt to impugn the validity of the tax deeds which were the basis of respondent's title. The contention of her counsel below and in this court appears to be that a tax deed does not eliminate her claim. The contention cannot be upheld. Rev. & Tax. Code., secs. 3520, 3712; People v. Maxfield, 30 Cal.2d 485, 487, 183 P.2d 897.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

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102 Cal.App.2d 179

AYLWARD v. WELLS et al.

Civ. 17758.

District Court of Appeal, Second District,
Division 1, California.
Feb. 7, 1951.

Ann Aylward brought an action against Grace M. Wells, and others, to recover money allegedly loaned to a decedent for investment in his business. The Superior Court of Los Angeles County, Benjamin J. Scheinman, J., rendered judgment for defendants, and denied plaintiff's motion for new trial, and plaintiff appealed. The District Court of Appeal, Hanson, Justice, pro tem., held that evidence failed to establish that plaintiff loaned any money to the decedent.

Judgment affirmed.

Executors and administrators 🔑221(6)

In action by receptionist, who kept deceased doctor's simple account books, against his estate to recover money allegedly loaned to doctor which he was to invest in his business, evidence failed to establish that receptionist made the loans.

Barry Sullivan and Harry V. Leppek, Los Angeles, for appellant.

Charles E. Beardsley, Los Angeles, for respondents.

HANSON, Justice pro tem.

Only two questions are presented for decision, one as to the sufficiency of the evidence to sustain the judgment, and the other as to certain rulings on evidence.

After the rejection of her three separate claims filed against the estate of George D. Wells, deceased, plaintiff instituted this action setting forth three counts in her complaint. The first count avers that plaintiff supplied the decedent Dr. Wells with $2,000 on August 15, 1946, under an oral agreement that he would purchase two specified lots and hold title thereto in his and her behalf as equal beneficiaries. The count averred the due presentation to and rejection by the administratrix of Wells of this claim.

The second count likewise predicated on one of the claims filed by her avers a loan by plaintiff of $7,000, in installments, beginning with November 14, 1946, and ending February, 6, 1948, the last installment being in the sum of $2,150. (The decedent Wells died on February 9, 1948.) This count likewise avers the due presentation to and rejection by the administratrix of this claim. Parenthetically it should here be stated that the claim, as filed, asserted plaintiff "invested" the moneys "in the business of George D. Wells, deceased, known as George D. Wells Emergency Hospital," whereas the count predicated upon this claim sought a recovery on the theory of a loan to Dr. Wells and not as an "investment" in his business.

The third count avers that in 1927 the plaintiff and Dr. Wells entered into an oral contract to devote their time and effort in developing the medical business of Dr. Wells and that whatever property they acquired should be owned and shared equally although title thereto was to stand in decedent's name; that the parties operated accordingly for 20 years up to May, 1947, when plaintiff left her employ temporarily but was induced to return upon the representation that the doctor had drawn a will and executed other written documents by which it would be shown plaintiff was a half-owner of the medical business and of all his other property; and moreover, if he predeceased her, she would be invested with his interest in the business and of all his property. Upon such representation plaintiff avers she returned and continued to work in the business until decedent's death less than a year later.

The testimony of the plaintiff was substantially in accord with the allegations of her complaint. The only corroboration for any of her testimony may now briefly be stated. Her witness Contessoto testified that decedent, on an occasion when he made a loan to him, remarked that he and the plaintiff had jointly bought the two lots here involved. The witness Niemann's testimony was that the decedent told him that he and the plaintiff were purchasing property together; that at the time he saw "a pile" of money on the doctor's desk and the latter mentioned it was to be used in buying two lots. Witness Sherman testified that she was in the office when the doctor gathered up the money stating that he was going to the bank to get a cashier's check for it; that when the doctor returned he told the witness that the clerk at the bank had asked him if he had been "playing craps" the night before because of the many small bills tendered in payment thereof; that the doctor handed the cashier's check to the plaintiff who put it in an envelope, addressed, and mailed it; that some weeks later the witness heard the doctor say to plaintiff: "Ann, let's make $1,000 on our lot." The witness Gertrude Wolferman testified Wells told her that "Everything he had belonged to Ann."

From these recitals it is evident, in view of the judgment, that the trial court did not believe the testimony of the plaintiff and her witnesses.

We turn at once to set forth a resume of the evidence that tended to contradict the case of the plaintiff. It appears that the plaintiff first met the decedent Dr. Wells in 1924. The doctor had an M.D. degree and at the time was operating an industrial hospital. He was married and had two daughters. According to the testimony of plaintiff he told her in conversations between February and June, 1927, that he was "going broke"; that if plaintiff would come to the hospital and aid him that the two would "share and share alike" in the business. On that basis she went to work for him and continued with him uninterruptedly for 20 years. At the beginning she received an irregular and not specific salary, but by 1937 he was giving her a regular salary and at the time of his death she was getting a salary of $350 a month.

We pause to observe that there is nothing in the record to indicate that plaintiff in 1927 was a nurse or had any business or hospital experience or for that matter any qualifications. Why then would a doctor with a medical degree, a family to support, and an established business divide his net earnings arising from his professional ability with a person who seemingly, at best, was equipped perhaps to do menial work, or act as a receptionist, and keep the doctor's simple account books? Then again why was she paid a salary at all if she was to receive half the net income from his professional business?

Plaintiff testified that the doctor to her knowledge had borrowed moneys from three different persons at different times for the business. He gave them promissory notes, but in no instance did she sign any of them despite her alleged interest in the business. She deposited the moneys he thus borrowed to one of his bank accounts. There was no bank account in which the two shared or upon which she could draw checks. He, however, had two bank accounts; one personal, the other for his business. The plaintiff had no bank account of her own. She testified she at all times had a considerable amount in cash, mostly in bills of large denomination. All this she kept in a bureau drawer in her home. She says she loaned the doctor $7,000 in currency in the space of two years—all of it came from the bureau drawer. What she loaned him, she says, did not go into his bank accounts, but instead he carried it in his pockets. She loaned him the moneys "when he was hard up" to pay specific bills. The showing by his bank records was that he had adequate funds in the bank to pay the bills mentioned by her. What is more it was shown the bills were paid by checks on his account and not by cash derived from her. While others got promissory notes for the moneys they loaned the doctor, plaintiff did not nor did she even request as much as a scrap of paper to evidence the loans she made to him. The plaintiff made loans aggregating $3,150 after May, 1947 (when she says she threatened to sue Dr. Wells), and neither got nor took any memorandum to evidence the loans.

While the plaintiff kept or at least supervised the account books of the doctor, she never requested him to enter therein any liability in her favor. After having testified that her loans to the doctor were deposited in his bank accounts, she was compelled to retract her testimony when the bank records were shown to her. She then took the position that he always carried the currency she loaned him in his pockets. We need not further recite the numerous additional conflicts in plaintiff's own testimony. It is enough to point out that there was a similar definite conflict in the testimony of plaintiff's principal witness. In view of this narrative of the facts it is self-evident that the trial judge found himself unable to credit the testimony of the plaintiff. We fail to see, after a review of the record, how he could have arrived at any other judgment than the one he rendered.

There remains for consideration, however, the contention of appellant that the court erroneously excluded certain evidence which would have had a material bearing in sustaining her case. We agree with appellant that what she sought to prove was relevant, but we cannot agree that it would have helped in sustaining her case. Moreover, the difficulty with all the questions put by counsel for appellant is that the form of the questions was objected to and properly sustained on that ground. We do not stop to discuss in detail the rulings as to us it is crystal clear that they were correct.

The judgment is affirmed and the appeal from the order denying a motion for a new trial is dismissed.

WHITE, P. J., and DORAN, J., concur.

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102 Cal.App.2d 147

DARDEN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 18333.

District Court of Appeal, Second District, Division 2, California.

Feb. 5, 1951.

Mandamus proceeding by Charles S. Darden, petitioner, to compel the Superior Court, Los Angeles County, to appoint commissioners to appraise corporate shares in Lake Shore Beach Company belonging to Arthur L. Reese and to order their transfer to petitioner. The District Court of Appeal, Moore, P. J., held that petitioner had a plain, speedy and adequate remedy at law.

Alternative writ discharged, peremptory writ denied.

1. Mandamus 🔑4(1)

Where there is a right to an immediate review by appeal that remedy is almost as speedy as a proceeding for writ of mandamus and therefore must be considered adequate unless petitioner can show some special reason why it is not.

2. Appeal and error 🔑82(3)

Order vacating a previous order to stay proceedings in corporate dissolution action was appealable as a special order after final judgment. Code Civ.Proc. § 1963.

3. Mandamus ⊂⊃4(4)

Where order complained of was appealable as a special order after final judgment, and an immediate review was available, reviewing court could not direct a modification of order by mandamus in absence of special circumstances. Code Civ. Proc. § 1963.

4. Mandamus ⊂⊃4(4)

Generally, a litigant is required to seek his remedy against an adverse judgment by appeal.

5. Mandamus ⊂⊃154(4)

Allegations, of majority stockholder, that corporation was unable to do business, that its assets were being consumed by taxes and expenses and as a result his shares were constantly losing value, were insufficient to support petition for writ of mandamus to compel superior court to appoint commissioners to appraise minority stockholder's shares, to compel transfer of stock, or to stay dissolution proceedings. Corporation Code, §§ 4658, 4659; Code Civ.Proc. § 1963.

◆

Edward Carter Maddox and Charles S. Darden, Los Angeles, for plaintiff.

Harold W. Kennedy, County Counsel and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for defendant.

Harold B. Pool, Los Angeles, for Arthur L. Reese.

MOORE, Presiding Justice.

This proceeding for a writ of mandamus arises from an action commenced by Reese, a minority shareholder, against the petitioner herein and the Lake Shore Beach Company, of which petitioner is the majority shareholder. By his action Reese sought specific performance of a contract to purchase real property from the corporation, and in a fourth count he demanded a dissolution of the corporation. After trial judgment was entered decreeing dissolution of the corporation and providing that Reese receive, as part of his distributive share, the real property involved in the suit. Thereafter, petitioner instituted proceedings pursuant to Corporation Code section 4658 to purchase the stock owned by Reese and to stay proceedings in the dissolution action. An order was thereafter entered in accordance with petitioner's request but conditioned on the posting of a $12,000 bond to protect Reese's right and on the corporation's assent to the further condition that Reese was to have the right to complete the purchase of the property sought by his initial action. Subsequently the court, on finding that the escrow instructions regarding the transfer of the property had not been complied with, vacated its prior order.

Petitioner now seeks a writ of mandamus to compel respondent court to appoint the necessary commissioners to appraise Reese's shares, to order the transfer of the stock to him pursuant to Corporation Code sections 4658 and 4659 and to stay further dissolution proceedings. Relying on the cited statutes and the decision in Merlino v. Fresno Macaroni Manufacturing Co., 64 Cal.App.2d 462, 148 P.2d 884, petitioner contends that it is mandatory for the court to permit him as holder of more than 50 per cent of the corporate shares to purchase the shares of Reese when the requirements of the Code section are met.

[1-5] The question for decision is whether petitioner had a plain, speedy and adequate remedy at law. It is the settled practice that "where there is a right to an immediate review by appeal that remedy is almost as speedy as a writ proceeding." Therefore it must be considered adequate unless the petitioner can show some special reason why appeal is rendered inadequate by the special circumstances alleged. Phelan v. Superior Court, 35 Cal.2d 363, 370, 217 P.2d 951. Inasmuch as the order complained of was appealable as a special order after final judgment, Code Civ.Proc., sec. 1963, and an immediate review was available, the reviewing court cannot direct a modification of the order by mandamus unless the special circumstances alleged by petitioner constitute a clear exception to the general rule requiring a litigant to seek his remedy by appeal. Petitioner undertook to come within this exception by

averring: the corporation is now unable to do business; its assets are now being consumed by taxes and expenses; as a result, his shares are constantly losing value; an appeal is slow and costly. However, these facts demonstrate only that the remedy by appeal will accomplish exactly the same result which petitioner would achieve by mandamus. There is no showing that an appeal would be inadequate. The simple fact that mandamus might be somewhat speedier is not sufficient to justify the repudiation of a time-honored principle and an established practice by directing the issuance of the writ.

The alternative writ is discharged; the peremptory writ is denied.

McCOMB and WILSON, JJ., concur.

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102 Cal.App.2d 149

PEOPLE v. KITTRELLE.

Cr. 4502.

District Court of Appeal, Second District, Division 2, California.

Feb. 5, 1951.

Rehearing Denied Feb. 14, 1951.

Hearing Denied March 5, 1951.

Paul W. Kittrelle was convicted in the Superior Court of Los Angeles County, Charles W. Fricke, J., of burglary with intent to commit theft and rape and with burglary, and he appealed. The District Court of Appeal, Wilson, J., held that evidence sustained the convictions.

Affirmed.

1. Criminal law 🔑260(11)

The trier of fact is the sole judge of the weight and worth of the evidence in a criminal prosecution.

2. Criminal law 🔑1134(1)

The function of the District Court of Appeal on appeal from a judgment of conviction is to correct errors of law.

3. Criminal law 🔑260(11)

Where a jury has been waived, before judgment may be set aside on appeal it must clearly appear that on no hypothesis is there sufficient evidence, circumstantial or otherwise, to support the conclusion reached by the trial court.

4. Criminal law 🔑260(11)

The question of the identification of the perpetrator of a crime is one for determination by trier of fact and unless evidence of identity is so weak as to constitute no evidence at all, the District Court of Appeal cannot set aside the decision of the trial court.

5. Criminal law 🔑566

In order to sustain a conviction, it is not necessary that the identification be positive or free from inconsistencies.

6. Burglary 🔑41(1)

Evidence sustained conviction of burglary with intent to commit theft and rape.

7. Burglary 🔑41(6)

Fact that defendant owned an automobile similar to that which was parked in front of prosecuting witness' house and in which intruder into prosecuting witness' house drove away, was a circumstance indicating that defendant was guilty of burglary charge.

8. Criminal law 🔑618

Where defendant was originally charged under two separate counts of burglary based on same entry of residence of prosecuting witness with intent to commit theft and intent to commit rape, and at close of people's case court consolidated the two counts into a single count charging burglary with intent to commit theft and rape, court properly consolidated the counts.

9. Burglary 🔑2

Though entry of a residence by the accused may have been with the intent to commit two or more felonies, the entry would constitute only one burglary.

10. Criminal law 🔑1159(2)

The intention with which accused enters the house of another is a question of fact, and where circumstances of particular case and conduct of accused reasonably indicated his purpose in doing so is to commit a larceny or any felony, a verdict of guilty of burglary will not be disturbed on appeal.

11. Criminal law ⚷552(1)

The commission of a crime may be adequately established entirely by circumstantial evidence.

12. Criminal law ⚷1159(3)

A conviction may not be set aside because evidence is susceptible of two reasonable inferences, one looking to defendant's guilt and the other to defendant's innocence.

13. Criminal law ⚷351(3)

Flight by defendant from police officer near scene of burglary was a circumstance which could be considered with all other facts as tending to prove a consciousness of guilt.

14. Criminal law ⚷351(10)

False and inconsistent statements are an indication of consciousness of guilt.

15. Burglary ⚷41(1)

Evidence sustained burglary conviction.

◆

Sam Houston Allen, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Howard S. Goldin, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Defendant was charged by informations with two crimes of burglary. In count one of the first information he was accused of having entered the house of one Roy Moye with the intent to commit theft and in count two thereof he was charged with having entered the same house on the same date with the intent to commit rape. In the second information defendant was accused of having entered the house of one Enola Ravenscroft with the intent to commit theft. He pleaded not guilty in each action and the two causes were consolidated for trial, which was before the court without a jury. At the trial counts one and two of the Moye case were consolidated into count I of the information and defendant was charged with "burglary with intent to commit theft and rape." He was found guilty in the Moye case of the charge in count I and guilty as charged in the Ravenscroft information. He is appealing from each of the judgments of conviction.

The Moye Case

On September 17, 1949, shortly before 5 o'clock in the morning, Mrs. Moye was awakened by a movement of the bed covers at the foot of her bed as if someone were pulling at them. She opened her eyes and saw a man leaning over the foot of her bed. Although inside the room it was semidark, it was light outside. As she looked at him the man raised up and turned facing her and as he straightened up he drew his coat together. He began to walk toward the doorway leading into the hall. At that moment she screamed that there was a man in the house and he started to run. He escaped hurriedly into the hall, slamming the door after him.

Mr. Moye, who was asleep in the twin bed next to his wife, was awakened by her scream. He jumped out of bed and about ten feet away he saw the door between the bedroom and the hall close slowly at first and then slam. Mr. and Mrs. Moye both pursued the man through the house and outside. Mr. Moye was about 25 feet behind him going down the back stairs and saw him go around the side of the house toward the front. They saw him get into a 1947 or 1948 green Studebaker car, which was parked at the curb in front of their house, and drive off. When Mr. Moye reached the street the car was about 75 feet from him and he kept it under observation for about 500 feet. He returned to the house and notified the police. Mrs. Moye examined the premises but found nothing disturbed.

Defendant was stopped by the police at 5:00 or 5:15 A.M. of that day, about five miles from the Moye residence, at which time he was driving a 1947 or 1948 blue-green Studebaker sedan. At that time the police knew none of the details of the burglary and they released defendant when they found nothing in his car indicating a burglary. He was subsequently apprehended at his residence.

Later in the same day, in the police showup, Mrs. Moye identified defendant as the person who had been in her bedroom. Mr.

Moye could not definitely identify the face of defendant but noticed that he was of the same build, same type and same general structure.

The following week Mr. and Mrs. Moye, having read defendant's address in a newspaper, drove by his home where they saw in the garage the front end of a green Studebaker sedan which corresponded in type of body, color, make and year with that driven away from their home by the intruder on the morning of September 17.

Defendant contends the evidence is insufficient to support a conviction; that where circumstantial evidence is relied upon the facts must not only be consistent with the theory of guilt but must be inconsistent with any other rational conclusion. The cases cited by defendant are not applicable, the quoted portion in each dealing with the necessity of properly instructing the jury with respect to circumstantial evidence. The instant case was tried by the court sitting without a jury.

[1-3] The trier of fact is the sole judge of the weight and worth of the evidence. The function of this court is to correct errors of law and, where a jury has been waived, before the judgment may be set aside on appeal it must clearly appear that upon no hypothesis is there sufficient evidence, circumstantial or otherwise, to support the conclusion reached by the trial court. People v. Hills, 30 Cal.2d 694, 701, 185 P.2d 11; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

Defendant maintains that his identification was insufficient; that Mr. Moye testified he was unable to identify him at the police station and his only basis of identification was that the man he chased drove away in a green Studebaker automobile and three or four days later he drove by defendant's home and saw the front end of a car which resembled that automobile; that his identification by Mrs. Moye was insufficient for the reason that the shades were drawn in the bedroom and the light was inadequate to permit the positive identification of his features; that she observed him for only six or seven seconds before he left the room; that her testimony "is so factually improbable as to itself indicate that there is a mistake in identity"; that since he was between her and the light, his face would be in almost complete darkness by reason of the fact that the light came from behind him and that at no time did Mrs. Moye have sufficient light to distinguish his features; that the Moyes had telephoned the police immediately after the intruder had left their house stating that he left in a car carrying out-of-state license plates, that he wore a gray tweed suit and that he had on a light colored hat whereas when defendant was first stopped by the police he was not wearing a gray tweed suit, did not have a hat on his head or in the car and the car did not have out-of-state license plates.

[4, 5] The question of identification of the perpetrator of a crime is one for determination by the trier of fact and unless the evidence of identity is so weak as to constitute no evidence at all this court cannot set aside the decision of the trial court. People v. Alexander, 92 Cal.App.2d 230, 234, 206 P.2d 657; People v. Waller, 14 Cal.2d 693, 700, 96 P.2d 344; People v. Farrington, 213 Cal. 459, 463, 2 P.2d 814; People v. Hightower, 40 Cal.App.2d 102, 106-107, 104 P.2d 378. In order to sustain a conviction it is not necessary that the identification be positive or free from inconsistencies. People v. Deal, 42 Cal.App.2d 33, 36, 108 P.2d 103; People v. Waller, supra; People v. Suttles, 61 Cal.App.2d 641, 643, 143 P.2d 506.

[6] Mrs. Moye's identification of defendant as the person who was in her bedroom was positive and unequivocal. She testified she could see his face from the forehead down and that it was light enough for her to see his features; that he was standing at the side near the foot of her bed and in the light which came through a door at the foot of her bed; he had been so close she could almost touch him as he came near the head of her bed on his way to the doorway leading into the hall; she noticed his manner of walking and his habit of pulling his coat forward and buttoning it. Without any hesitation she picked him out of the police show-up the

moment he entered. Although Mr. Moye was unable to identify the features of the person he chased from his home, later in the same day at the police show-up he picked defendant as being of the same build, type and general structure.

[7] The fact that defendant owned a car similar to that which was parked in front of the Moyes' house and in which the intruder drove away is a circumstance indicating guilt. People v. Kepford, 10 Cal.App.2d 128, 130, 51 P.2d 429; People v. Latona, 2 Cal.2d 714, 724, 43 P.2d 260. Moreover, defendant incriminated himself when, en route to the police station, he said: "Do you think I would be foolish enough to molest a woman with her husband in the bed—or in the room?" Up to that point the police officers had not mentioned that a man had been in the bedroom.

[8, 9] Defendant maintains there is no evidence sufficient to establish that he entered the premises with the intent of committing rape and therefore "the entire judgment must be reversed for the reason that it was not worded in the alternative." This contention is without merit. Defendant was originally charged with two separate counts of burglary based on the same entry of the Moyes' residence—(1) an entry with intent to commit theft and (2) an entry with intent to commit rape. At the close of the people's case the court consolidated the two counts into a single count charging "burglary with intent to commit theft and rape." The trial court properly consolidated the two counts. Defendant was charged with but one substantive offense, to wit, the crime of burglary. That crime was complete upon the entry by defendant of the Moyes' house with intent to commit grand or petit larceny or any felony. The entry may have been made with the intent to commit two or more felonies but it would constitute only the one burglary. People v. Hall, 94 Cal. 595, 597, 30 P. 7; People v. Milne, 60 Cal. 71, 72. In People v. Hall, supra, the information charged defendant with entering a certain dwelling house with the intent to commit grand and petit larceny. The court held that the information charged but one offense and was good against demurrer and that to sustain a conviction the prosecution need only prove that defendant entered the building with intent to commit grand *or* petit larceny. In People v. Swaile, 12 Cal.App. 192, 107 P. 134, the defendant was accused of placing an explosive near a dwelling house with intent to injure, intimidate and terrify human beings. The court stated, 12 Cal.App. at page 195, 107 P. at page 136, "The information is not bad for duplicity because it alleges more than one intent in the commission of the crime. Accepting the contention of appellant that the 'intent' is one of the essential elements of this offense the rule applicable here would be the one declared in People v. Frank, 28 Cal. 507, as follows: 'Where, in defining an offense, a statute enumerates a series of acts, either of which separately or all together, may constitute the offense, all such acts may be charged in a single count, for the reason that, notwithstanding each may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense.' People v. Leyshon, 108 Cal. 440, 442, 41 P. 480." The court further stated that since it was one offense, the district attorney was not required to elect which charge he would try and that it was proper for the trial court to instruct the jury that the evidence was sufficient to sustain a conviction if it showed that the defendant intended either to injure, or to intimidate, or to terrify any of the persons named in the information.

[10] The intention with which an accused enters the house of another is a question of fact and where the circumstances of a particular case and the conduct of the accused reasonably indicate his purpose in doing so is to commit a larceny or any felony a verdict of guilty of the crime of burglary will not be disturbed on appeal. People v. Swenson, 28 Cal.App.2d 636, 639–640, 83 P.2d 70; People v. Winters, 93 Cal. 277, 282, 28 P. 946. Defendant was identified as the person who uninvited, before 5 o'clock in the morning, made his entry into the Moyes' house and into their bedroom. Obviously he was not there for any legitimate purpose. He awakened Mrs. Moye by pulling at the

bedclothes and she opened her eyes when "finally it felt like a lifting of the bed covers at the foot of my bed." When his presence was discovered he fled. The evidence and the reasonable inferences therefrom justify the conclusion that defendant entered the house with the intent to commit larceny and rape.

The Ravenscroft Case

Mrs. Ravenscroft and her daughter, Marianne, lived in a studio apartment to which there were two entrances, one leading into the living room and a rear entrance from a small service porch off the kitchen. On the night of January 17, 1950, Marianne, who slept in the bedroom upstairs, retired at about 8 o'clock. Mrs. Ravenscroft slept in a bed in the living room and before she retired, sometime between 10:30 and 11 o'clock, she hooked the screen door on the service porch, locked the back door and placed a chair underneath its knob, and locked the front door and all the windows. She also turned on the light on the service porch.

At approximately 3 A.M. of the following morning she heard the front screen, which had not been locked, being pulled open. She immediately ran upstairs and asked her daughter to call the police, who came almost immediately. Investigation disclosed that the back screen door had been unhooked and the light on the service porch had been turned off. There was a small hole in the screen about three or four inches from and level with the hook and was the type of hole that "a wire clothesline would make." The light on the back porch was controlled by a switch inside the kitchen door but it could also be turned off by a butterfly switch or cord hanging close to the bulb on the porch. On the night in question it had not been turned off by the kitchen switch.

Sergeant Stevens of the Los Angeles Police Department was on duty alone in a police car at about 3:05 A.M. on January 18, 1950, when he received a radio call to proceed to 2009 Vista Del Mar, which was the address of the Ravenscroft apartment. At about 3:08 A.M., as he turned from Franklin into Vista Del Mar, about 700 feet up the block he saw headlights leave the curb and come toward his own car. As the car approached the officer turned his flashlight on the driver of the vehicle, the car being a 1948 Studebaker sedan. Each car was going from 10 to 15 miles an hour. Stevens identified defendant as the driver of the car which he had seen pull away from the curb in the 2000 block on Vista Del Mar.

When the officer flashed his light on defendant the headlights of the Studebaker went out and remained off thereafter. The car proceeded south on Vista Del Mar without lights and with the police car in pursuit. Stevens snapped on the red light and siren of the police car about 300 feet behind defendant. A chase ensued which led past the police station with both cars reaching a speed of 70 miles an hour. Defendant finally pulled over to the curb. The officer noticed that both of defendant's shoelaces were untied; his socks were wet and there were particles of grass attached to them and inside his shoes. At the police station a piece of wire resembling a straightened out wire from a wooden coat hanger was removed from defendant's pocket. The end of the wire had on it some green paint. There was a grass lawn in front of Mrs. Ravenscroft's apartment and between the buildings. The frame of the back screen door was painted green.

Defendant asserts the evidence is insufficient to establish that he entered the Ravenscroft premises.

The evidence is clear that someone entered the rear service porch after Mrs. Ravenscroft had retired. She had personally locked the back screen door and turned on the light on the porch. She had locked the door leading from the porch to the kitchen and placed a chair under the door handle. When the police arrived the kitchen door was still locked and the chair was still wedged under the doorknob. The back screen door was unhooked and the light on the porch had been turned off not by the kitchen switch but by the switch on the service porch. Subsequently the small hole was discovered in the screen door near the hook.

[11-15] Unquestionably the commission of a crime may be adequately established entirely by circumstantial evidence and a conviction may not be set aside because the evidence is susceptible of two reasonable inferences, one looking to defendant's guilt and the other to his innocence. People v. Green, 13 Cal.2d 37, 42, 87 P.2d 821. Defendant was observed in close proximity to the Ravenscroft premises. It was necessary for the police car with its red light showing and its siren operating to pursue defendant for many blocks before he could be brought to a stop. His flight is a circumstance which may be considered with all the other facts as tending to prove a consciousness of guilt. People v. Santora, 51 Cal.App.2d 707, 710, 125 P.2d 606. False and inconsistent statements are also an indication of consciousness of guilt. People v. Anderson, 90 Cal.App.2d 326, 333, 202 P.2d 1044; People v. Cooper, 81 Cal.App.2d 110, 117, 183 P.2d 67. Defendant denied he had been chased by a police car and insisted he had stopped immediately after he heard the siren. A police officer, other than the driver of the pursuing police car, positively identified defendant as the driver of a 1948 Studebaker who had been chased past the Hollywood police station by a police car flashing a red light and with its siren screaming. On the way to the police station defendant was asked what he had been doing on that street. He replied he had been selling liquor and when the officer stated it was 3:00 A.M. and there were no liquor stores in the vicinity, defendant replied: "Well, I don't choose to tell you. It is your business to find out." Defendant's explanation of the condition of his feet was that he had untied his shoelaces because his feet hurt and his socks were damp because he had washed them in the forenoon of the preceding day and placed them on the grass to dry. He denied ever having seen the wire which was removed from his coat pocket. From the circumstances hereinabove related, notwithstanding defendant's denials, the court was justified in concluding that it was defendant who had entered the service porch of the Ravenscroft premises.

Affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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102 Cal.App.2d 206

WILLIAMS v. WILLIAMS.

Civ. 18111.

District Court of Appeal, Second District, Division 2, California.

Feb. 8, 1951.

Hearing Denied April 5, 1951.

Action by Don S. Williams against Susie Williams for annulment of marriage. The Superior Court of Los Angeles County, Thurmond Clarke, J., rendered judgment annulling the marriage, and the plaintiff appealed from that part of the judgment awarding custody of minor children to defendant and ordering plaintiff to pay support money for the children. The District Court of Appeal, McComb, J., held that a judgment declaring marriage void in accordance with prayer of husband's complaint on ground that wife's former marriage was in force was granted pursuant to Civ.Code § 82, subd. 2, permitting annulment by reason of undissolved former marriage of one of spouses and was not granted because of fraud or force of wife, and hence court had authority to award custody of minor children to wife and to make a proper allowance for their support.

Judgment affirmed.

Marriage 🔑**64**

A judgment declaring marriage void in accordance with prayer of husband's complaint on ground that wife's former marriage was in force was granted pursuant to statute permitting annulment by reason of undissolved former marriage of one of spouses and was not granted because of fraud or force of wife, and hence court had authority to award custody of minor children to wife and make a proper allowance for their support. Civ.Code, §§ 61, 82, subd. 2, 84.

Walter L. Gordon, Jr., Los Angeles, for appellant.

Curtis C. Taylor, Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff appeals from the portion of a judgment in a decree annulling his marriage to defendant which awards the custody of the minor children of the parties to defendant and orders plaintiff to pay defendant the sum of $10.00 per week for the support of said minor children.

Chronology

i. Plaintiff and defendant were married September 20, 1945.

ii. As a result of the marriage two children were born.

iii. December 28, 1948, plaintiff learned that defendant was not a single woman at the time he married her, but was married to one Frank Gardner.

iv. Plaintiff instituted the present action for annulment of the marriage, stating that defendant had represented to him that she was a single woman; that he had relied on these representations; that otherwise he would not have consented to marry her; and that by reason of such fraud and deception practiced on plaintiff, "said marriage, though regular in form, was null and void," and prayed "that the marriage as heretofore entered into between plaintiff and defendant be annulled, declared void and of no force and effect."

v. The trial court found, supported by substantial evidence, that the foregoing facts were true and that "the marriage, though regular in form, is null and void."

In the conclusions of law the trial court stated "that the marriage between the parties hereto is null and void and voidable, and plaintiff is entitled to a decree of annulment."

In the judgment the trial court ordered "that the marriage heretofore entered into by and between Plaintiff and Defendant be and the same is hereby declared to be void from the beginning and also voidable, and is annulled."

Question

In view of the provisions of section 84 of the Civil Code, did the trial court have the authority to award the custody of the children of the parties to defendant and order plaintiff to pay for their support?

Yes. Section 84 of the Civil Code of the State of California reads: "A judgment of nullity of marriage does not affect the legitimacy of children conceived or born before the judgment, and the court may during the pendency of the action, or at the time judgment is rendered or at any time thereafter make such order for the custody, care, education, maintenance and support of such children during their minority as may seem necessary or proper; except that the court must award the custody of the children of a marriage annulled on the ground of fraud or force to the innocent parent."

The present case does not, as contended by plaintiff, fall within the provision of the foregoing section that where a marriage is annulled for fraud or force the custody of the children must be given to the innocent party. The decree was granted pursuant to subdivision 2 of section 82 of the Civil Code which reads: "A marriage may be annulled for any of the following causes, existing at the time of the marriage: * * * Two. That the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force," and not because of the fraud or force of defendant.

This is made clear by the fact that section 61 of the Civil Code makes a subsequent marriage contracted by any person during the life of a former husband or wife of such person with any person other than such former husband and wife *illegal and void from the beginning,* unless the former marriage has been annulled or dissolved, or unless such former husband or wife is absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or is generally reputed or believed by such person to be dead at the time such subsequent marriage was contracted. (See also Anderson v.

Anderson, 7 Cal.2d 265, 266, 60 P.2d 290; Sullivan v. Sullivan, 219 Cal. 734, 735 et seq., 28 P.2d 915.)

In the present case the plaintiff prayed in his complaint that the marriage be declared void. The trial court found it was void and so stated in its conclusions of law and judgment. It is clear the marriage was annulled because it fell within the purview of subdivision 2 of section 82 of the Civil Code, supra. Had it been granted upon the ground of fraud it would have been only a voidable marriage. As the marriage was annulled because it was void, since defendant was not free to remarry at the time she entered into the contract with plaintiff, the court had authority under the general rule stated in section 84 of the Civil Code, supra, to award the custody of the minor children to either party and to make a proper allowance for their support.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

102 Cal.App.2d 215

PEOPLE v. DEVERICH.

Cr. 4544.

District Court of Appeal, Second District, Division 2, California.

Feb. 9, 1951.

Hearing Denied March 8, 1951.

Albert Douglas Deverich was convicted in the Superior Court of Los Angeles County, David Coleman, J., of conspiracy to steal an automobile, and of grand theft, and he appealed. The District Court of Appeal, McComb, J., held that there was sufficient corroboration of testimony of defendant's admitted accomplice to sustain verdict of guilty on each count.

Judgment and order denying motion for new trial affirmed.

1. Criminal law 🔑1159(5)

Where there is evidence from which the jury may find either that a witness was or was not a defendant's accomplice, jury's finding is binding upon an appellate court.

2. Criminal law 🔑511(2)

Evidence, offered as corroboration, which tends to connect defendant with commission of crime in such a way as to reasonably satisfy a jury that an accomplice is telling the truth, is sufficient corroboration to meet requirements of code that a conviction cannot be had upon testimony of an accomplice unless it be corroborated by other evidence tending to connect defendant with the offense. Pen. Code, § 1111.

3. Criminal law 🔑507½

In prosecution for conspiracy to steal an automobile and grand theft, testimony by prosecution's witnesses that they believed defendant was having trouble with a finance company, and that that was the reason he was trying to hide the automobile supported implied finding by jury that witnesses were not defendant's accomplices.

4. Criminal law 🔑511(2)

In prosecution for conspiracy to steal an automobile and grand theft, testimony of defendant's admitted accomplice was sufficiently corroborated by testimony of other witnesses to meet requirements of statute that a conviction can not be had upon testimony of an accomplice unless it is corroborated by other evidence tending to connect defendant with the offense. Pen.Code, § 1111.

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Jules J. Covey, Hollywood, and Ward Sullivan, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of (a) conspiracy to steal an automobile, and (b) grand theft, after trial before a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

Facts: From the testimony of an admitted accomplice of defendant the record discloses that about the first of October, 1949, defendant stated to his accomplice, Mr. Sanders, that he was desirous of obtaining an automobile; later Sanders introduced defendant to Al Gordon at which time defendant stated he was interested in getting a stolen automobile. He drew a map of roads leading to his house and garage and told Gordon that if he found anybody who would steal a car, the thief would know the way to his garage by use of the map.

On the evening of October 9, 1949, Sanders called for defendant at his home and they drove to Big Town Motors, a used car lot at the corner of Fourth Street and Vermont Avenue in Los Angeles. On the used car lot there was a 1949 Cadillac for sale. There was a set of keys in the glove compartment of the car and another set in the ignition. Defendant and Sanders talked with Mr. Prager, a salesman for the Big Town Motors business, relative to the 1949 Cadillac. Defendant entered the car through the door on the driver's side and sat in it. Without looking at any other cars they left the lot, and as they were driving away defendant gave Sanders a set of keys and said they were the keys to the Cadillac they had just been looking at. Defendant said to give the keys to Al Gordon.

After leaving defendant at his home, Sanders went to a show with Evelyn Phillips. After the show as they were driving they noticed Al Gordon in a gas station whereupon they stopped and Sanders told Gordon that they had a car in mind, where it was, and that he had the keys to it. Gordon then got into the automobile with Sanders and Phillips and they drove to the Big Town Motors lot where Sanders pointed out the car and then drove down the street a block and parked. Sanders then gave Gordon the keys to the Cadillac at which they had just been looking. Gordon went to the used car lot and drove the 1949 Cadillac to Franklin Avenue just above Cahuenga where he met Sanders who told him to park the Cadillac on a side street which he did.

The three then went to defendant's home and Sanders told him that Gordon had the car. Defendant said, "Don't bring the car over here because I just got a phone call from my uncle and he told me that he had some information that I had been taking too many hot cars up north, and that I couldn't have any more cars around my house that were hot like that."

Defendant stated that he would go over and arrange with Mr. Scalvace to leave the car at his house. Sanders, Gordon and Phillips drove back to the 1949 Cadillac where Gordon got into it and drove it to Scalvace's house. There he met Sanders and defendant. Scalvace said he did not want to have anything to do with a stolen car. The car was then driven by Gordon to Sanders' house and kept in his garage overnight.

The next day Sanders, accompanied by defendant, went to Mr. Robert's place of business and asked if they could store a car in his place. Roberts said it was all right with him. The three then went to the Sanders garage where defendant told Sanders it would be best if he would take one of the license plates from his 1948 Cadillac and put in on the 1949 Cadillac, whereupon this was done. Defendant then drove the stolen car from Sanders' house to Robert's home in Laurel Canyon. The car remained in the driveway of Robert's home for a week or 10 days.

The car was then taken to Gene's Body Shop by Sanders where they talked to a man named Bob who was told by Sanders that he had purchased a car from a finance company and as he could not get into the shop, he asked Bob to take the car home with him, which Bob agreed to do.

Thereafter the car was put into the body shop, painted black, the chrome removed and the tires changed. While it was there defendant went in and looked at it.

Subsequently defendant took the car out of the shop and stated that he would handle the matter of getting the car back to the rightful owner and that anybody connected with the case would have all charges dismissed, and he, defendant, would get $400 or $500 from the insurance company for returning the car.

Thereafter Al Weiman, at Sanders' request drove the car to Tracy, California, accompanied by Scalvace in the car with him, and Sanders and Phillips went in Sanders' Ford. When the two groups reached Tracy, Sanders had a conversation with Otto Blevins, the father of Evelyn Phillips, in which Sanders asked if he could store the Cadillac for a week or two because he was having trouble getting title to the car. Blevins said he did not have a place to keep it, but that it could be put in the garage at a friend's place. The Cadillac was driven to the garage of a Mr. Garavente by Weiman.

After the car was in the garage Scalvace took a crowbar and obliterated the motor numbers. Thereafter the police found the car in the Garavente garage.

Question: Was the testimony of defendant's admitted accomplice sufficiently corroborated to meet the requirements of section 1111 of the Penal Code? [1]

This question must be answered in the affirmative and is governed by these pertinent rules of law:

[1] (1) Where there is evidence from which the jury may find either that a witness was or was not an accomplice of defendant, the jury's finding is binding upon an appellate court. (People v. Williams, 30 Cal.App.2d 234, 238, 85 P.2d 974; People v. Seiffert, 81 Cal.App. 195, 197 et seq., 253 P. 189.)

[2] (2) When evidence offered as corroboration tends to connect defendant with the commission of the crime in such a way as to reasonably satisfy a jury that an accomplice is telling the truth, such evidence is sufficient corroboration to meet the requirements of section 1111 of the Penal Code. (People v. Trujillo, 32 Cal. 2d 105, 111, 194 P.2d 681.)

[3] Applying the foregoing rules to the facts of the instant case, witnesses Roberts and Weiman each testified that they believed defendant was having trouble with a finance company and that this was the reason he was trying to hide the 1949 Cadillac.

The jury was justified in believing this evidence which supports its implied finding that such witnesses were not accomplices of defendant, and under rule (1) above such finding is binding upon this court.

The fact that witness Weiman while in Tracy was near Messrs. Sanders and Blevins during which time they had a conversation by which it was disclosed that the Cadillac had been stolen does not show that such witness was an accomplice and knew the car was stolen because there is no evidence that he heard the conversation as he was some 15 or 20 feet from the parties. The jury may have believed that he did not hear the conversation and therefore that he did not know the car was stolen.

[4] The testimony which these two witnesses gave disclosed that defendant suggested that the license plates on the 1949 Cadillac be changed which was done in defendant's presence; that the car was kept by defendant at witness Robert's home for a week or 10 days; and that thereafter the car was transported to Tracy for the purpose of being secreted, clearly meets the requirements of rule (2) supra, and tended to connect defendant with the conspiracy to seal the car and the grand theft thereof. This was sufficient corroboration of the testimony of defendant's admitted accomplice to sustain the verdicts of guilty on each count.

The judgment and order are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

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[1] Section 1111 of the Penal Code reads: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

102 Cal.App.2d 159

PEOPLE v. HALEY.

Cr. 4522.

District Court of Appeal, Second District,
Division 2, California.
Feb. 5, 1951.

Margaret Haley was found guilty in the Superior Court of Los Angeles County, H. J. Borde, J., of soliciting a person to commit and join in the commission of the crime of perjury and placed on probation for a period of five years, and she appealed from the order denying a new trial and purportedly appealed from nonexisting judgment. The District Court of Appeal, Wilson, J., held that defendant could be found guilty of soliciting the commission or the joining in the commission of the crime of perjury, notwithstanding that one whom defendant allegedly solicited did not commit perjury at her request by taking an oath to testify truly before a competent tribunal and thereafter stating under oath as true a material matter which he knew to be false.

Order affirmed, and purported appeal from judgment which was not rendered dismissed.

1. Perjury ⚷33(9)

Evidence supported conviction of soliciting one to commit and join in commission of crime of perjury. Pen. Code, § 653f.

2. Criminal law ⚷641(1)

Examination of record failed to show that defendant did not have a fair trial by reason of misconduct and suppression of evidence by attorney who represented her at trial.

3. Criminal law ⚷1032(6)

An objection that information charging defendant with having solicited one to commit and join in commission of crime of perjury improperly charged defendant with two offenses could not be first raised on appeal. Pen. Code, § 653f.

4. Criminal law ⚷1186(4)

Where defect in information is merely technical and does not affect substantial rights of the defendant, a verdict of guilty will not be disturbed. Pen. Code, §§ 960, 1404.

5. Criminal law ⚷45

A person who solicited another to commit or join in commission of one of the crimes specified in statute is guilty of a violation of that statute even though criminal offense solicited is never committed. Pen. Code, § 653f.

6. Perjury ⚷13

Defendant could be convicted of soliciting the commission or joining in the commission of crime of perjury, notwithstanding that one whom she solicited did not commit perjury at her request by taking an oath to testify truly before a competent tribunal and thereafter stating under oath as true and material matter which he knew to be false. Pen.Code, §§ 118, 653f.

7. Criminal law ⚷507(9), 780(1)

In prosecution for soliciting one to commit and join in the commission of crime of perjury, one whom defendant allegedly solicited was not an "accomplice", and trial court did not err in failing to give instructions relating to accomplices. Pen. Code, §§ 653f, 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

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Jack B. Adams, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Defendant was charged with a violation of section 653f of the Penal Code—soliciting one Paul Howard to commit and join in the commission of the crime of perjury. She was tried by a jury and found guilty. A motion in arrest of judgment and a motion for a new trial were made and denied. Judgment was not pronounced but proceedings were suspended and defendant was placed on probation for a period of five years. She has appealed from the order denying a new trial and has purportedly appealed from the nonexistent judgment.

This prosecution arises from a pretense made by defendant that she had been injured by an automobile driven by one Dr. Brotman, who had been her attending physician for some time previous to the date of the feigned injury. Dr. Brotman's car did not strike defendant and her claim was spurious.

After having personally accused Dr. Brotman of striking her with his car she telephoned him on two or three occasions asking "What are you going to do about it?" and he replied that he would report the matter to his insurance company, which he did. Later she telephoned the doctor that the claim agent of the insurance company had told her and her attorney that there was no evidence of any accident and refused to pay her anything. She insisted that Dr. Brotman pay her medical bills, which he refused to do.

Defendant then sought the assistance of Paul Howard in attempting to prove her alleged injury. She telephoned him to come to her home and upon his arrival he found her in bed; she told him she had been injured in an accident and related the time, place and speed of the car which she said had struck her; she said it was a doctor's car but did not tell Howard the name of the doctor; she said she wanted Howard to be a witness in her behalf and to say he saw the accident. He asked her how he could be a witness when he did not see any accident, to which she replied that she would tell him what to say. On a second occasion she told Howard she would give him all the facts and tell him how to describe the accident—that she was in the crosswalk when the doctor's car knocked her down; that she had $728 in her purse; that some one helped her up and later she noticed the money was gone. She told him to say he had been close by the scene of the accident. She said there were other persons who offered to be witnesses but she did not take their names because they had been too far away from the intersection; that she had picked Howard because he was living near by; that she did not know how much would come out of the incident but whatever she got she would give Howard a part of it. She described the car that she claimed had struck her but did not give the doctor's name and did not give the license number. On a third occasion the same matters were discussed and she told Howard the license number of Dr. Brotman's car and gave him $20. Howard asked her how she would circumvent a lawsuit and she said she would see he was taken care of if he would be a witness for her; that many people settled their cases out of court and she would wait for a good offer.

On another occasion defendant took Howard for a ride in her car and discussed her purported accident again. On this occasion she told Howard she had testified for a plaintiff who supposedly had stepped in a crack in the sidewalk and turned her ankle; that she testified she saw the woman fall and the woman won her case, and she saw no reason why the same result could not be attained in her own action. Howard then told her he would be a witness in her behalf.

Previous to the last meeting between defendant and Howard he had conferred with a police officer. A few days later he called defendant from the police station and talked with her for about an hour while a police officer listened on another telephone. She told Howard they had got their stories mixed and would have to get them straight. Knowing that defendant had talked with a deputy city attorney about the accident, Howard told defendant he had seen the same deputy and the latter believed what had been told him about the accident. Actually, however, Howard had not seen the deputy city attorney. During this conversation defendant told Howard she had bigger plans for a similar scheme against the May Company; that she was going to sue the company in the hope of getting $25,000, in which event she would take care of Howard. Two days later Howard made another telephone call to defendant from the police station, the same officer listening on another instrument, when the accident and the possibility of a settlement were discussed. A few days later Howard again called defendant from the police station and talked with her for an hour and a half. Listening to the conversation were the same officer and a shorthand reporter who recorded the conversation.

Immediately after the date on which defendant claimed to have been injured she called a physician to her home who made an examination of her body and found no bruises. He testified that he found a tenderness in the area near the right kidney. (Dr. Brotman had treated defendant for a kidney infection.) X-ray photographs were made which revealed no broken bones or other signs of injury.

Defendant filed an action against Dr. Brotman for damages, and after telling her story to a deputy city attorney she signed and swore to a criminal complaint against the doctor which was filed. The deputy testified that no warrant was to be issued and no prosecution was to be had and that the reason for having defendant sign the complaint was to have her swear under oath that the facts contained in the document were true. Defendant asserted that the accident took place on October 1, 1949; she did not report it to the police until October 21.

[1] The foregoing outline disposes of defendant's contention that the evidence is insufficient to sustain the verdict. During her conversations with Howard she made several statements to the effect that the case would probably be settled out of court and that Howard would not be called upon to testify. In her brief she quotes several isolated statements to that effect and contends that she did not intend to have Howard commit perjury by testifying in court but that he was to make statements to the insurance adjustor which would assist in obtaining a settlement without the trial of her action. Inasmuch as she had filed her complaint seeking damages and had had Howard confer with her attorney no other conclusion can be reached than that she intended that Howard should testify in her behalf in that action.

[2] Defendant contends she did not have a fair trial by reason of misconduct and suppression of evidence by her trial attorney, not counsel who appears for her on this appeal. (1) She asserts that inadmissible evidence was admitted without objection on the part of her attorney but she does not point out such evidence in her brief and this court is not called upon to read the transcript for the purpose of finding such evidence, if it exists. (2) She complains that her attorney did not offer in evidence a written statement in the handwriting of Dr. Gottlieb, the physician called by her after the date of the purported accident. The doctor testified fully and completely as to his examination of defendant and his findings resulting from such examination and the written statement, which was submitted in an affidavit on motion for a new trial, does not appear to add to or subtract from the doctor's evidence. Furthermore, any statement relating to defendant's physical condition is immaterial since she is charged with having solicited Howard to testify that he had seen the alleged accident which she asserted caused her injuries when in fact Howard had not been present and had no knowledge of the purported incident other than that which defendant related to him. (3) Defendant charges that her counsel forced her to admit one of the telephone conversations which Howard had with her from the police station. This complaint is unfounded since in her testimony she denied every telephonic conversation with Howard except that which she claims her attorney forced her to admit; she testified that she had examined the transcript of the colloquy in question and it was not correct in some particulars; although she had an opportunity to disclaim the conversation she did not deny that it took place but pointed to several statements contained in the transcript which she said were not made. (4) As to her assertion that her mother was not permitted to testify, it does not appear from the record or from affidavits on motion for new trial that her mother would have given material evidence if called. (5) One Cargile testified as a witness in her behalf and she makes some indefinite claim that the attention of the court and jury should have been called to the fact that he had been asked not to be a witness for her. There is nothing in the record to show that any such request was made of Cargile and this charge, like the others, is without foundation. An examination of the record indicates that her trial counsel made a diligent defense.

[3, 4] The information charges defendant with having solicited Howard "to commit and join in the commission of the crime of perjury." Defendant contends she was charged with two offenses, to wit: having solicited Howard (1) to commit perjury, and (2) to join in the commission of perjury. Defendant did not demur to the information and no notice was taken of this point at the trial. Defendant was not misled but was fully advised of the offense of which she was accused. People v. Codina, 30 Cal.2d 356, 360–362, 181 P.2d 881; People v. Hitchcock, 104 Cal. 482, 484, 38 P. 198. Such objection may not be first raised on appeal. Defendant was charged and convicted of one crime—unlawful solicitation. Furthermore, where a defect in an information is merely technical and does not affect the substantial rights of the defendant, a verdict of guilt will not be disturbed. Penal Code, secs. 960, 1404; People v. Hitchcock, supra; People v. Pierce, 14 Cal.2d 639, 644 ff, 96 P.2d 784.

[5, 6] Defendant contends she is not guilty of soliciting the commission or the joining in the commission of the crime of perjury upon the fallacious theory that she could not have been guilty of such crime unless and until Howard had committed perjury at her request by taking an oath to testify truly before a competent tribunal and thereafter stating under oath as true a material matter which he knew to be false. Penal Code, sec. 118. A person who solicits another to commit or to join in the commission of one of the crimes mentioned in section 653f is guilty of a violation of that section even though the criminal offense solicited is never committed, People v. Baskins, 72 Cal.App.2d 728, 733, 165 P.2d 510, and even though the other person rejects the importunity and refuses to testify. People v. Gray, 52 Cal.App.2d 620, 644–645, 127 P.2d 72. The evidence shows that defendant solicited Howard to be a witness and to testify concerning a pretended accident that never occurred.

[7] Defendant assigns error in the failure of the court to instruct the jury (a) that it was a question of fact for the jury to determine whether or not Howard was an accomplice, and (b) that the testimony of an accomplice should be viewed with distrust. Such instruction had no place in the trial of this action. An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Penal Code, sec. 1111. Howard could not have been prosecuted for soliciting the commission of perjury. He did not solicit anyone and he did not join with defendant in the solicitation of any person to commit a crime. He was not an accomplice and the court did not err in having failed to give instructions relating to accomplices. People v. Baskins, supra, 72 Cal.App.2d at page 731, 165 P.2d 510.

Order denying new trial affirmed. Purported appeal from judgment which was not rendered is dismissed.

MOORE, P. J., and McCOMB, J., concur.

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102 Cal.App.2d 209

HARNDEN v. HARNDEN.

Civ. 18151.

District Court of Appeal, Second District, Division 2, California.

Feb. 8, 1951.

Hearing Denied April 5, 1951.

Mary A. Harnden brought action against William A. Harnden for divorce. From an order of the Superior Court of Los Angeles County, Joseph M. Maltby, J., refusing to modify provisions of an interlocutory decree of divorce between the parties relating to alimony accruing after remarriage of the plaintiff, the defendant appealed. The District Court of Appeal, McComb, J., held that where property settlement agreement incorporated by reference into divorce decree contained provision that for a certain number of years alimony to which wife should be entitled could not be increased or decreased from a certain amount, right of former wife to receive alimony from former husband did not cease immediately upon her remarriage during the specified period.

Order affirmed.

Divorce 🔑247

Where property settlement agreement incorporated by reference into divorce decree contained provision that for certain number of years the alimony to which wife should be entitled could not be increased or decreased from a certain amount, right of former wife to receive alimony from former husband did not immediately cease upon her remarriage during the specified period. Civ.Code, § 159.

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Joseph F. Rank, Los Angeles, Donald J. Pierr, Los Angeles, of counsel, for appellant.

Lawrence P. McHugh, Beverly Hills, for respondent.

McCOMB, Justice.

This is an appeal by the former husband of plaintiff from an order refusing to modify the provisions of an interlocutory decree of divorce between the parties relating to alimony accruing after the remarriage of plaintiff.

Facts: On the 8th day of May, 1946, an interlocutory decree of divorce was entered. Said decree incorporated by reference and partly *in haec verba* a property settlement agreement executed by the parties May 7, 1946, and ordered that defendant pay plaintiff $400 per month alimony for her support and maintenance and continuing until further order of the court.

Thereafter on May 20, 1947, a final decree was entered incorporating by reference all the provisions of the interlocutory decree.

The property settlement agreement provided among other things as follows: "4. The parties hereto agree that the Husband shall pay to the Wife as alimony the sum of Four hundred dollars ($400) per month payable Two hundred dollars ($200) on the first and fifteenth of each and every month, commencing with the payment of $200 on the 15th day of May, 1946. The parties agree that the within provision for the payment of alimony by Husband to Wife shall be incorporated into any decree made and entered in the now pending action between the parties, or any other action which may be brought by either party affecting the marital status of the parties, and the parties do hereby further agree and stipulate that neither party shall for a period of five (5) years from date hereof make application or seek to modify in any manner the said order for payments as herein provided. It is further understood and agreed that the above mentioned five-year period is not by way of limitation on the payment of alimony by Husband to Wife, but after such five-year period expires either party, if he or she so desires, may make application to the Court for modification of said order."

On March 8, 1950, plaintiff remarried and is now the lawful wife of a person other than defendant. On May 2, 1950, defendant sought an order in the trial court modifying the interlocutory and final decrees to provide that he be not required to make further payments of alimony to plaintiff subsequent to her remarriage on March 8, 1950. This application was denied.

Question: Does not the right of a former wife to receive alimony from a former husband cease upon her remarriage, even though a provision of a property settlement agreement (incorporated by reference into the divorce decrees) provides in effect, that for a certain number of years the alimony to which the wife may be entitled shall not be increased or decreased from a certain amount?

No. Section 159 of the Civil Code reads: "A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation."

The property settlement agreement between the parties which was approved by the court contained the provision that "the parties do hereby further agree and stipulate that neither party shall for a period of five (5) years from date hereof make application or seek to modify in any manner the said order for payments as herein provided * * *. but after such five-year period expires either party, if he or she so desires, may make application to the Court for modification of said order."

The provisions of the agreement between the parties are clear and unequivocal. They were authorized to enter into such an agreement pursuant to the provisions of section 159 of the Civil Code and such agreement, having been approved by the court, was binding upon both parties. Five years not having elapsed from the date of the making of the agreement the trial court properly refused to grant defendant's application.

Danz v. Danz, 96 Cal.App.2d 709, 216 P.2d 162, and similar cases relied on by defendant, are factually distinguishable from the present case, and since a mere reading of such cases clearly discloses the differences, it would serve no useful purpose to set them forth in extenso.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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102 Cal.App.2d 188

EMPLOYERS LIABILITY ASSUR. CORP. OF LONDON, ENGLAND v. PACIFIC EMPLOYERS INS. CO. et al.

Civ. 17671.

District Court of Appeal, Second District, Division 2, California.

Feb. 8, 1951.

Hearing Denied April 5, 1951.

Action by the Employers Liability Assurance Corporation of London, England, a corporation, against the Pacific Employers Insurance Company, a corporation, and others, for declaratory relief as to plaintiff's liability under its policy of insurance. The Superior Court of Los Angeles County, Philip H. Richards, J., entered a judgment construing the policies in question and the plaintiff appealed. The District Court of Appeal, Wilson, J., held that where the policy of one insurer covered liability for automobile bodily injury, and policy of another insurer covered injury arising out of use of ownership, maintenance and use of automobiles, neither insurer was primarily liable and both were jointly liable for the damages.

Affirmed.

1. Insurance 🔑512½

Where the policies of two different insurers, each provided excess insurance provisions, both insurers became concurrent insurers for liability of the insured.

2. Insurance 🔑512½

Where comprehensive policy of one insurer covered liability for automobile bodily injury, while policy of another covered bodily injury arising out of ownership, maintenance or use of automobiles, neither insurer was primarily liable and both were jointly liable.

Betts, Ely & Loomis, Los Angeles, for appellant.

Crider, Runkle & Tilson, Los Angeles, for respondent.

WILSON, Justice.

Employers Liability Assurance Corporation of London, hereinafter referred to as Employers, brought this action for declaratory relief to determine its liability and that of defendant Pacific Employers Insurance Company, hereinafter referred to as Pacific, under policies of insurance written by each company providing public liability insurance for defendant Salvation Army. From a judgment construing the policies and determining the liability of each of the respective insurance companies, plaintiff has appealed.

The Pacific policy, which is designated a "Comprehensive Liability" policy of insurance, provides damage indemnity for (1) automobile bodily injury, (2) automobile property damage, (3) bodily injury other than automobile, and (4) product and products liability. By an endorsement attached to the policy coverage for items

(1) and (2) was excluded as to automobiles owned or hired by the Salvation Army. Notwithstanding these exclusions, however, Salvation Army had coverage under the policy for automobile bodily injury and automobile property damage arising out of and caused by any automobile not owned or hired by it and while being driven by an employee in the course of his employment. The limit of liability of the policy is $100,000 for one injured person.

The Employers policy is designated as a "Standard Automobile Combination Policy," and covers damages from bodily injuries from owned cars, hired cars, loaned cars, and, by Endorsement No. 4, from injuries arising from the use of nonowned automobiles driven by employees of the Salvation Army in the course of their employment. The limit of liability provided for in the policy is $25,000 for one injured person.

Defendant Eldin K. Tobin was an employee of the Salvation Army. On April 15, 1947, while driving an automobile owned by him, and while acting within the scope of his employment, Tobin collided with another automobile in which defendant Margaret Jones was riding as a passenger. A separate action has been filed by Margaret Jones against Tobin and the Salvation Army in which she seeks a judgment in the amount of $109,600 for personal injuries alleged to have been sustained by her in the accident.

At the time of the accident Tobin carried liability insurance covering his automobile with the Phoenix Indemnity Company. Under the terms of the policy Tobin and the Salvation Army, if it were liable, were insured against bodily injuries caused by the ownership, use or maintenance of the specified automobile. The Phoenix Indemnity Company admits its liability up to its policy limit of $10,000 for any judgment which may be rendered in the action brought by Margaret Jones.

The controversy between Employers and Pacific, both of whose policies were in force at the date of the accident, is as to which company is required by the provisions of their respective policies of insurance to pay the excess of any judgment over $10,000 which may be rendered in favor of defendant Margaret Jones and against defendant Salvation Army.

The policies of Employers and Pacific each contain "other insurance" clauses. Condition "H" of the Pacific policy reads as follows: "Other Insurance: If other valid insurance or indemnity exists protecting the Insured or any person or organization entitled to protection hereunder, from liability for bodily injuries, sickness, disease, or death or for damage to property of others, this policy shall be null and void in respect of such specific hazard otherwise covered, whether the Insured is specifically named in said other policy or not; provided, however, that if the limits of insurance in this policy are in excess of the limits provided by said other insurance, this policy shall provide excess insurance against said hazard in an amount sufficient to give the Insured a combined amount of protection equal to the limits of this policy."

Provision No. 4 of Endorsement No. 4 of the Employers policy reads: "The insurance shall be excess insurance over any other valid and collectible insurance available to the Insured, either as an insured under a policy applicable with respect to the nonowned automobile, or otherwise, against a loss covered hereunder."

The trial court found that each of the policies provides excess insurance and that Employers and Pacific are concurrent insurers for liability which may be imposed on defendant Salvation Army in excess of $10,000; that as concurrent insurers each is liable in the proportion which the collectible amount of each policy bears to the total collectible amount of excess insurance; that the collectible amount under Employers policy is $25,000 and under Pacific policy is $90,000; that Employers is liable for 25/115ths and the liability of Pacific is 90/115ths of any judgment against defendant Salvation Army in excess of $10,000 in an action arising out of the accident, the total liabilities of Employers and Pacific not to exceed $25,000 and $90,000 respectively.

Appellant Pacific contends that the Employers policy, in addition to the Phoenix

Indemnity policy, constitutes "other valid insurance or indemnity" within the meaning of that term in condition "H" of appellant's policy; that by reason thereof its policy is "null and void" except in the event of a judgment against defendant Salvation Army in excess of $35,000, which is the aggregate limit of the Phoenix Indemnity and the Employers policies.

Appellant's policy stipulates that it shall be null and void if "other valid insurance or indemnity exists" but that it shall provide excess insurance over limits provided by such other insurance. Employers policy stipulates that it shall be excess over any other valid and collectible insurance.

[1] Appellant concedes that the only other "valid and collectible insurance" in this case is the insurance provided by the Phoenix Indemnity policy. The insurance afforded by Employers policy is, therefore, excess insurance and the excess insurance provided by that policy is not "valid insurance * * * protecting the insured" under the terms of condition "H" of Pacific's policy. Air Transport Mfg. Co. Ltd. v. Employers' Liability Assurance Corp., 91 Cal.App.2d 129, 133, 204 P.2d 647; Zurich General Accident & Liability Ins. Co. v. Clamor, 7 Cir., 124 F.2d 717, 720. It follows, therefore, that both Employers and Pacific policies provide excess insurance and as such they become concurrent insurers for liability which may be imposed on defendant Salvation Army in excess of $10,000.

Appellant maintains that even assuming that each of the policies constituted excess insurance, Employers policy is specific in nature whereas that of appellant is comprehensive or general and therefore the liability of Employers is primary and that of appellant is secondary. This contention is not supported by the cases cited by appellant, which are readily distinguishable from the instant case.

In Commercial Casualty Insurance Co. v. Hartford Accident & Indemnity Co., 190 Minn. 528, 252 N.W. 434, 435, 253 N.W. 888, the plaintiff issued its automobile policy to Strom, an independent contractor and the owner of the truck involved in the accident. The policy contained the clause: "If any other person, firm or corporation included in this insurance is covered by valid and collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be entitled to indemnity or protection under this policy." Defendant issued its policy to a contractor, Hanlon & Okes, at a reduced premium because the policy constituted excess coverage only "with respect to use in connection with the assured's business of automobiles and trailers hired or owned by independent contractors". The policy provided that if the assured was covered under a policy taken out by the owner of the automobile, the policy should be excess coverage over and above the valid and collectible insurance taken out by the owner. The court held that the primary liability was on Strom and the insurer of that risk was plaintiff. The secondary liability was upon Hanlon & Okes. The primary insurer having paid the entire loss was not entitled to contribution from defendant, whose insurance was secondary or excess. The court stated that the defendant's policy "in limitation of its coverage to the interest of Hanlon & Okes to liability resulting from the use in their business of the motor equipment of subcontractors" was more specific and narrowing in effect and the two policies did not cover the same risk with enough identity of scope and purpose to be concurrent. The theory that the insurer covering the primary tort feasor is liable to its policy limits and the insurer covering the secondary tort-feasor is liable for excess insurance only has been rejected in California. Consolidated Shippers, Inc. v. Pacific Employers Ins. Co., 45 Cal.App.2d 288, 114 P.2d 34; Air Transport Mfg. Co. Ltd. v. Employers' Liability etc. Corp., 91 Cal.App.2d 129, 204 P.2d 647. Moreover, in the instant case, neither appellant nor respondent insured the party driving the car involved in the accident.

In Trinity Universal Insurance Co. v. General Accident etc. Corporation, 138 Ohio St. 488, 35 N.E.2d 836, defendant's policy covered any accident on the assured's premises but contained a limitation that if the assured carried other insurance against a loss arising out of an accident also covered by its policy, and if an accident occurred within or upon the insured premises and was due either directly or indirectly to an automobile, defendant's policy should be excess insurance. The policy issued by plaintiff provided only automobile insurance and specifically covered the truck which was involved in the accident on the assured's premises. The policy provided that if the assured had other insurance against a loss covered by that policy, then defendant's policy provided pro rata insurance only. The court stated that the plaintiff's policy was specific and that of defendant was general; that under the general rule, the specific insurer is primarily liable; that it was also of importance that defendant's policy was the only one mentioning excess insurance; that although the policy covered generally all bodily injuries occurring accidentally anywhere on the premises of the insured, it excluded injuries if caused by a truck on the premises at a time when there was other coverage on the truck; that in that event liability was expressly limited to any excess above the maximum provided in the other policy.

In Hartford Steam Boiler Inspection & Ins. Co. v. Cochran Oil Mill & Ginnery Co., 26 Ga.App. 288, 105 S.E. 856, the Hartford policy provided steam boiler insurance primarily covering property damage claims and secondarily provided protection in case of injury to persons. The Georgia Casualty Company issued its policy to the same assured protecting it against claims of injured employees. An employee of the assured was injured through a boiler explosion. The court stated that the only point of contact, the only contingency under which both policies became applicable, was where an employee was injured on account of a boiler or pipe explosion; that for the purposes of comparison the various elements and provisions of the two contracts would be disregarded except as they bore upon or related to the happening of the one contingency under which each policy might be held primarily or secondarily liable; that upon an employee's being injured by a boiler explosion the Hartford Company was liable first and primarily for the inevitably resulting property loss and, should there be a surplus of insurance left over, it was liable for injuries both to employees and nonemployees; that the liability of the Casualty Company was limited solely to personal injuries to employees; therefore, in any case where both of the policies could possibly take effect, the liability of the Hartford Company for personal injuries was general while that of the Casualty Company was specific.

In the instant case appellant's policy, while it is designated a comprehensive policy, and indeed in its coverage is more general than that of respondent, nevertheless specifically covers the very claims covered by respondent's policy. Appellant's policy covers liability for automobile bodily injury, the insuring agreement reading as follows: "(1) Bodily injury, sickness or disease, including death at any time resulting therefrom (including damages for care and loss of services) suffered or alleged to have been suffered by any person or persons arising out of the ownership, maintenance or use of automobiles, including loading and unloading thereof." Paralleling this, respondent's policy, in Insuring Agreement I, provides: "Coverage A—Bodily Injury Liability. To pay on behalf of the Insured, all sums which the Insured shall become obligated to pay by reason of the liability imposed on him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile."

[2] With respect to such injuries the policy of Pacific was, if anything, more narrowing in effect than was that of Employers. The latter policy covered owned cars, loaned cars and nonowned cars when driven by an employee of Salvation Army. Upon the other hand, the Pacific policy excluded in its coverage automobiles owned or hired by Salvation Army. At the point of contact, however, the risk covered is identical since each policy specifically cov-

ers bodily injuries arising out of the ownership, maintenance or use of automobiles. Inasmuch as the policies had in effect the same coverage, neither could be primary but both insurers are jointly liable. Consolidated Shippers, Inc., v. Pacific Employers Ins. Co., 45 Cal.App.2d 288, 291, 114 P.2d 34.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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102 Cal.App.2d 170

CARTER et al. v. HOBBA, Mayor, et al.

Civ. 17728.

District Court of Appeal, Second District, Division 1, California.

Feb. 6, 1951.

Rehearing Denied March 5, 1951.

Harold Carter, doing business as Harold Carter Detective Agency, filed a petition against William J. Hobba, Mayor of the City of Signal Hill, and others, for a writ of mandate compelling city officials to issue a license for plaintiff's private patrol system. The Superior Court of Los Angeles County, Clarence M. Hanson, J., granted a peremptory writ of mandate and defendants appealed. The District Court of Appeal, Doran, J., held that appellants had shown no abuse of discretion by trial court as would justify a reversal of judgment.

Judgment affirmed.

1. Mandamus 🔑187(9)

Judgment of Superior Court rendered after hearing on order to show cause, and ordering city officials to issue license to plaintiff for plaintiff's private patrol system, carried with it presumption of regularity. Business and Professions Code, § 7500 et seq.

2. Mandamus 🔑187(9)

On appeal from judgment of Superior Court granting a peremptory writ of mandate ordering city officials to issue a license for plaintiff's private patrol system, burden of pointing out some cogent reason for reversal rested upon appellant city officials. Business and Professions Code, § 7500 et seq.

3. Mandamus 🔑7

The writ of mandate is a writ of discretion and not a writ of right.

4. Mandamus 🔑187(9)

On appeal from judgment of Superior Court granting peremptory writ of mandate ordering city officials to issue a license for plaintiff's private patrol system, that Superior Court properly exercised its discretion would be assumed. Business and Professions Code, § 7500 et seq.

5. Mandamus 🔑187(7)

On appeal from judgment of Superior Court granting peremptory writ of mandate ordering city officials to issue a license for plaintiff's private patrol system, where record did not show what occurred at hearing nor show precise basis of decision, appellant city officials showed no abuse of discretion on part of Superior Court such as would justify reversal of judgment. Business and Professions Code, § 7500 et seq.

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Albert C. S. Ramsey, Milton Emlein, Long Beach, for appellants.

Joseph B. Boland, Long Beach, for respondent.

DORAN, Justice.

Plaintiff and respondent Carter is the owner of a private patrol system duly licensed under Chapter 11, Division 3 of the Business and Professions Code of the State of California. For some time prior to September 20, 1948, respondent had been engaged in the business of guarding private property for compensation in the City of Signal Hill, at which time there was no ordinance regulating such business. In connection with such business respondent had entered into various contracts with Signal Hill residents and businessmen for the protection of property in that district.

On December 20, 1948, the City of Signal Hill passed and adopted Ordinance 311 requiring for such business a permit from the

City Council with license fees of $25.00 for conducting a patrol system and $10.00 from every person engaged as a patrolman. On January 28, 1949, respondent Carter deposited with the City Clerk the sums above mentioned and requested the issuance of the specified licenses. Applications for such licenses were denied by the City Council at a meeting held on March 31, 1949. It appears that the basis for refusing to issue the licenses was a letter from the Chief of Police recommending such action because of a report, attached thereto, of Patrolman Schrank who, in turn, had been informed by the Sheriff's Office that respondent had been previously arrested, had an F. B. I. record, etc.

Respondent's petition for a writ of mandate was filed on June 27, 1949 seeking to compel issuance of the licenses in question. The appellant city officials filed a demurrer to the petition on the ground of uncertainty, and on July 15, 1949 this demurrer was sustained and respondent given 10 days to amend. Respondent's brief asserts that no written notice of the court's ruling was given although the right to such notice had been expressly reserved.

On August 1, 1949, eleven days after the demurrer was sustained, the City Council adopted, as an emergency measure to take immediate effect, Ordinance No. 315, providing, as appellants state, "a comprehensive series of provisions governing patrol systems". The respondent's brief avers that this was passed "surreptitiously", with one newspaper publication, and without notice to respondent.

An amended petition for writ of mandate was filed by respondent on August 31, 1949, thirty days after adoption of the new ordinance. In the amended petition the new ordinance is not mentioned. On September 16, 1949 an amended alternative writ of mandate was issued requiring the city officials to issue a license for a private patrol system under the original ordinance 311 or show cause in reference thereto. The appellant officials filed an answer and return, alleging passage of the new Ordinance No. 315; that respondent had not complied with Ordinance 315, and that by reason of its passage prior to the filing of respondent's amended petition, the matter had become moot.

The trial court, upon argument but without taking testimony, at first vacated the alternative writ and denied relief. Upon a motion for rehearing, however, the matter was reargued, after which the trial court ordered a peremptory writ requiring that defendants issue to the plaintiff a license for a private patrol system. The present appeal followed.

According to the appellants' brief, two questions are presented: (1) "Where the ordinance under which petitioner seeks the issuance of a permit is repealed prior to the filing of an amended writ of mandamus which is based upon the old ordinance, does the petition state a cause of action?"; (2) "Does an application for a permit to engage in business create a vested right so as not to be subject to legislation passed after the filing of the application and before the permit is granted?"

It is appellants' contention that since respondent's amended petition superseded the original petition, the latter cannot be considered for any purpose; that "the law in effect at the time of filing of the amended petition governed plaintiff's action". It is conceded that Ordinance 311 under which respondent proceeded, was unconstitutional and invalid.

Respondent contends that "Since the defendants attempted to deprive plaintiff of his substantial and vested contract rights without due process of law, and under an admittedly unconstitutional ordinance, and since the rights of a party are to be determined at the time of the filing of his cause of action the right of plaintiff to his business licenses under Ordinance 311 was incontrovertibly clear". It is further argued that "Even if the new ordinance is relied upon by defendants, it too is lacking in procedural due process". In this connection it is averred that respondent was refused a license "without any opportunity * * * to appear or to be heard in his own behalf, and acting solely upon the hearsay report consisting of a letter from the Chief of Police".

It is to be noted that the present controversy is before the appellate court not as an original proceeding to secure a writ of mandate but on appeal from a judgment wherein the Superior Court has granted a peremptory writ. The question herein presented, therefore, is not whether the reviewing court would, as an original matter, have granted the writ, but rather whether the appellants have pointed out some definite legal reason sufficient to justify interference with the action of the trial court.

The record discloses that the trial court granted an amended alternative writ on September 6, 1949, based upon respondent's verified amended petition setting forth that respondent had duly applied for licenses under Ordinance 311, and as stated in the writ, "that said licenses have been refused maliciously and wantonly". This writ, in the customary manner, commanded the appellant city officials to either issue respondent a patrol system license, or as an alternative, that appellants "show cause before this court * * * on the 19th day of Sept., 1949 * * * why you have not done so". As hereinbefore indicated, appellants refused to issue the license and at the hearing on the order to show cause strenuously contested the entire matter.

It is to be assumed that at the hearing on the order to show cause appellants and respondent presented to the trial court whatever arguments were deemed pertinent and essential. The trial court thereupon, after duly considering the arguments presented, rendered judgment ordering appellants to issue the license in question. The record on appeal is silent as to what took place at this hearing, nor does the precise basis for the trial court's decision appear. As in other contested issues, the judge was compelled to consider the various opposing propositions presented, and to weigh and choose that deemed sound and applicable under the peculiar facts involved.

[1-5] That such a decision of a trial court should not lightly be overturned, is obvious. The burden of pointing out some cogent reason for reversal rests upon the appellants. Like other judgments, the one here rendered carries with it the presumption of regularity. And, as is said in Gonsalves v. Associacao Protectora Uniao Madeirense, 70 Cal.App.2d 150, 154, 160 P.2d 595, 597, and elsewhere, "since the writ of mandate is a writ of discretion and not a writ of right * * * we must assume that the trial court, having before it all the circumstances * * * properly exercised its discretion". In the instant case appellants have shown no abuse of discretion as will justify a reversal.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

SIPE v. CORREA et al.

Civ. 17722.

District Court of Appeal, Second District,
Division 1, California.

Feb. 6, 1951.

Rehearing Denied Feb. 26, 1951.

Hearing Granted April 2, 1951.*

Action in partition by Frank R. Sipe against Delfino Correa and others to enforce the lien of street improvement bonds on realty which had been deeded to the state for delinquent taxes and purchased by defendants at tax sale. The Superior Court of Los Angeles County, Daniel N. Stevens, J., rendered a judgment in favor of defendants and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that action which was commenced after January 1, 1947, and more than four years after maturity of bonds, was barred by statute of limitations enacted after issuance of bonds.

Affirmed.

Doran, J., dissented.

1. Limitation of actions 🔑6(1)

The legislature may enact a statute of limitations applicable to existing causes of action or shorten a former limitation, if a reasonable time to commence the action is allowed.

2. Limitation of actions 🔑4(1)

Statutes of limitation are within the jurisdictional power of the legislature of a state.

* Subsequent opinion 238 P.2d 989.

3. Limitation of actions ⚷1, 5(1)

Statutes of limitation, being vital to the welfare of society, are favored by the law, and they are to be viewed as statutes of repose and as such constitute meritorious defenses.

4. Municipal corporations ⚷519(5)

Good public policy would indicate that there must be some limitation upon the existence of lien of street improvement bonds.

5. Limitation of actions ⚷6(4)

Where action in partition to enforce lien of street improvement bonds on realty which had been deeded to the state for delinquent county taxes and purchased by defendant at tax sale was commenced after January 1, 1947, and more than four years after maturity of bonds, the cause of action was barred by statute of limitations enacted after issuance of bonds and the lien of bonds was therefore extinguished. Code Civ.Proc. §§ 330, 752; Civ. Code, § 2911; Revenue and Taxation Code, § 3712.

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Robt. E. Rosskopf, John F. Bender and Gizella M. Allen, all of Los Angeles, for appellant.

Harold W. Kennedy, County Counsel and John D. Maharg, Deputy County Counsel, Los Angeles, Solon S. Kipp and W. F. Starke, San Diego, amici curiae.

No appearance for respondents.

DRAPEAU, Justice.

Plaintiff brings this action in partition. He alleges in his complaint that two street improvement bonds which he owns are liens upon real property, and prays for partition sale and payment to him of principal and interest due upon the bonds. He also prays for declaratory relief.

Defendants purchased the property at a tax sale, and claim that the tax deed passed title to them free from the lien of the bonds.

The trial court found for defendants, and plaintiff appeals. Other defendants named in the complaint did not appear upon the trial, being interested only in the former fee title.

Plaintiff's bonds are dated July 19, 1928, and January 29, 1931. They are ten-year bonds, issued under the County Improvement Act of 1921, with $93.15 and $393.79 due on each.

Prior to defendants' purchase, the property had been deeded to the state on or about July 1, 1936, for delinquent county taxes for the fiscal year 1930–31. Defendants paid $380 for the tax deed. The deed is dated March 17, 1947; the complaint was filed June 18, 1947.

Plaintiff asserts that the title conveyed by the state was subject to the parity lien of his bonds.

Amici curiae who have filed briefs in behalf of defendants contend that plaintiff neither stated nor proved a cause of action; that recovery on both bonds is barred by the provisions of Section 330 of the Code of Civil Procedure and Section 2911 of the Civil Code.

It is argued that the right to foreclose the bonds expired January 2, 1942, as to one bond, and January 2, 1945, as to the other; that the power of the treasurer to foreclose the bonds expired January 1, 1947; and that the lien of the bonds terminated on the last named date.

The trial court found that the liens were unenforceable because of the bar of our statute of limitations.

Plaintiff states his position as follows:

"As heretofore pointed out, the tax lien in this case arose in 1930. The property became delinquent in 1931 and was 'sold to the State'; in 1936 it was deeded to the State. The State of California thereafter held title until the sale to defendants Correa in March, 1947.

"The parity of liens arose when both liens were created on the property. The lien of Bond 176 arose on July 19, 1928. The tax lien arose on the first Monday in March, 1930, at a time when the bond lien was in existence, therefore creating a parity of liens. The lien of Bond 87 arose January 29, 1931, at which time the tax lien still existed, creating another lien on a parity with the tax lien. Therefore the liens were *all in existence as liens* on January 29, 1931, and the parity situation was established. The foreclosure of one of the liens does not affect the other.

* * * * * *

"The applicable statute in this case is Section 3712 Revenue and Taxation Code. The title conveyed by the State and acquired by defendants, under the terms of said section was 'free of all encumbrances of any kind existing before the sale, except: * * * Liens for special assessments levied upon the property conveyed * * *.'"

Section 752 of the Code of Civil Procedure permits partition "where real property is subject to a lien on a parity with that on which the owner's title is based, by the owner or by the holder of such lien, * *."

Plaintiff relies upon Monheit v. Cigna, 28 Cal.2d 19, 168 P.2d 965, 167 A.L.R. 995, and Elbert, Ltd. v. Nolan, 32 Cal.2d 610, 197 P.2d 537.

Unless the rules laid down in the foregoing cases have been superseded by valid legislation, plaintiff should prevail, his liens adjudged to be on a parity with the tax lien leading to defendants' title, and the rights of the parties declared accordingly.

Defendants contend that these cases were commenced before the effective date of the amendments providing for limitation of such actions as this, and are, therefore, no longer controlling.

[1] The Legislature may enact a statute of limitations applicable to existing causes of action or shorten a former limitation period if the time allowed to commence the action is reasonable. Mercury Herald Co. v. Moore, 22 Cal.2d 269, 138 P.2d 673, 147 A.L.R. 1111; Security First Nat. Bank v. Sartori, 34 Cal.App.2d 408, 93 P.2d 863; Rombotis v. Fink, 89 Cal.App.2d 378, 201 P.2d 588.

[2] Statutes of limitation are within the jurisdictional power of the legislature of a state. Saranac Land & Timber Co. v. Roberts, 177 U.S. 318, 20 S.Ct. 642, 44 L.Ed. 786.

[3] Statutes of limitation are vital to the welfare of society and are favored by the law. They are to be viewed as statutes of repose, and as such constitute meritorious defenses. Fontana Land Co. v. Laughlin, 199 Cal. 625, 250 P. 669, 48 A.L.R. 1308.

[4] Good public policy would indicate that there must be some limitation upon the existence of liens of street improvement bonds. To extend such liens indefinitely, increasing in amount year by year as interest accrues, to require purchasers at tax sales to pay such liens before real estate may be put to any useful purpose, keeps off the tax rolls property which would otherwise bear its share of costs of government.

The lot here in question remained for years an eyesore in the neighborhood, littered with tin cans and rubbish, fettered with liens of street improvement bonds which the owner failed to foreclose, having a free ride so far as taxes for the common good were concerned; with partition demanded only when changed economic conditions made it apparent that the amount of the bonds could be collected.

At any time before plaintiff's action became barred he could have acquired title to the lot, paid city and county taxes, and assumed a fair part of the burdens incident to all ownership of property.

[5] Under the facts in this case plaintiff's cause of action is barred by the statute of limitations.

The judgment is affirmed.

WHITE, P. J., concurs.

DORAN, Justice.

I dissent: In my opinion the bonds are a contract which must be governed by the law at the time the contract was executed. They represent a vested right and a property right although bonds are not "considered property subject to taxation." The legislature is without power to impair the obligation of a contract. So far as these bonds are concerned the code provisions relied on by defendants are ex post facto.

102 Cal.App.2d 211

KNIGHT v. SUPERIOR COURT OF TEHAMA COUNTY et al.

Civ. No. 7960.

District Court of Appeal, Third District, California.

Feb. 8, 1951.

Proceedings by Robert Knight, petitioner, against the Superior Court of the State of California, in and for the County of Tehama, H. S. Gans, P. J., for a writ of prohibition to restrain further proceedings in an action, wherein petitioner and three other juveniles were charged with commission of certain criminal offenses. The District Court of Appeal, Peek, J., held that Juvenile Court had right to exercise its discretion in determining whether or not petitioner was fit subject under Juvenile Court Law.

Writ denied, and alternative writ discharged.

1. Infants ⚷68

Juvenile Court has right to exercise its discretion in determining whether a delinquent under age of 18 years is a fit subject under Juvenile Court Law. Welfare and Institutions Code, §§ 734, 834.

2. Infants ⚷68

Amended minute order which remanded juveniles, charged with commission of certain criminal offenses, to Justice's Court, and which stated that boys with records like defendants should not undertake to use Juvenile Court, and that boys were not in very good standing, having rather bad records, was sufficient finding that one of the defendants was an unfit subject for consideration by Juvenile Court. Welfare and Institutions Code, §§ 734, 834.

◆

Rawlins Coffman, Red Bluff, for petitioner.

Fred N. Howser, Atty. Gen., By Doris H. Maier, Deputy, for respondent.

PEEK, Justice.

Petitioner seeks to restrain the Superior Court of Tehama County from further proceedings in an action wherein petitioner and three other juveniles are charged with the commission of certain criminal offenses.

The record before us shows that following the arrest of petitioner and his co-defendants a hearing was had in the Justice's Court of Red Bluff Township in the county of Tehama, at which time it appeared that when the alleged offenses were committed petitioner was under the age of eighteen years, to-wit, fifteen years, and that thereupon the matter was certified to the Juvenile Court of Tehama county. During the hearing in that court the report of the probation officer was filed which, among other things, recommended that the petitioner be returned to the certifying court. After some discussion between court and counsel concerning the report the court made its order returning petitioner and his co-defendants to the Justice's Court for further proceedings. At the preliminary hearing in the Justice's Court petitioner, through his court appointed counsel, objected to any proceeding therein upon the grounds that said court had no jurisdiction over him in that (1) under section 834 of the Welfare and Institutions Code as adopted in 1949, no court other than the Juvenile Court has jurisdiction of a minor under the age of sixteen years who is charged with the commission of a crime, and (2) that in any event the Juvenile Court did not find petitioner an unfit subject for consideration by said Juvenile Court. The objections were overruled and petitioner was held to answer in the Superior Court. Upon petitioner's arraignment in the Superior Court his counsel moved that the matter be transferred to the Juvenile Court and again objected to a hearing in that court upon the ground that only the Juvenile Court had sole jurisdiction of the case for the reasons heretofore mentioned. The Superior Court denied his motion and objection and set the matter for trial, whereupon petitioner filed this proceeding.

His argument in support of his first contention is that while the Juvenile Court could, prior to the adoption of said section 834, transfer criminal proceedings involving any one under the age of eighteen years to the appropriate court, the legislature, in adopting said section, indicated its intention that the Juvenile Court could *only* divest itself of jurisdiction as to minors *over* the age of sixteen years.

The section in question provides as follows: "Whenever a minor over the age of sixteen years is brought before the juvenile court by petition alleging that he comes within the description of subdivision (m) of Section 700, the court shall determine whether the minor is a fit subject for consideration under the Juvenile Court Law and shall make a special finding of fact on this issue. * * * If the court finds that the minor is not a fit subject under the Juvenile Court Law, the court shall dismiss the petition, and direct that criminal proceedings be instituted against the minor under the general law."

We do not agree with petitioner that section 834 can be read independently of the other provisions of the Welfare and Institutions Code. Especially is this true in regard to section 734 of the same code, which provides that, "If upon the hearing, or at any time thereafter, the court determines that any person alleged to come within the provisions of subdivision (m) of section 700 is not a fit and proper subject to be dealt with under the provisions of this chapter, the court may dismiss the petition, and direct that the person be prosecuted under the general law."

In People v. Wolff, 182 Cal. 728, 190 P. 22, which was a proceeding under the section of the Juvenile Court Act as originally enacted in 1915 and upon which section the present section 734 is based, it was held that the Juvenile Court had the power to determine that a person under sixteen years of age was not a fit subject for further consideration by that court and could direct that such person be prosecuted under the general law. See also People v. Renteria, 60 Cal.App.2d 463, 141 P.2d 37.

Additionally it should be noted that the Final Report of the Special Crime Study Commission on Juvenile Justice discusses the reasons for this particular provision, and in part states:

"At the present time the juvenile court has original and exclusive jurisdiction over all persons under eighteen years of age. Many serious offenses are committed by these persons. The natural tendency of the court is to retain jurisdiction and make disposition under procedures prescribed by the Juvenile Court Law. In some cases, most frequently occurring where the youthful offender is sixteen years of age or over, the nature of the case indicated by such factors as prior record, the type of offense, the character of the offender, is such that it should not be included within the philosophy, processing, or available facilities of the juvenile court. The enactment of this recommendation should result in more critical consideration being given to the fitness of the offender for juvenile court handling and should focus attention on the distinctions between the Juvenile Court Law and the Criminal Court Law.

It is hoped that the law enforcement officers will be alerted to prepare their cases as they would for a trial in the criminal court since it could no longer be assumed that the case would routinely be processed by the juvenile court. In cases which appear to law enforcement officers to be unfit for juvenile court adjudication they would have an incentive to retain evidence and preserve their records as for a criminal trial. This would reduce the number of occasions when for lack of proper evidence to convict in a criminal court, cases acknowledged to be unfit for juvenile court procedure have, nevertheless, been retained in the juvenile court, or on being remanded to the criminal court have been dismissed for lack of evidence."

[1] It is readily apparent from the foregoing report that in sponsoring section 834 it was not its intention to withdraw from the Juvenile Court the right to exercise its discretion in determining whether or not a delinquent under the age of eighteen years was a fit subject under the Juvenile Court Law.

[2] Petitioner's second contention likewise appears to be without merit. The record discloses that the amended minute order remanding petitioner and his codefendants to the Justice's Court included the following statement:

"'Well, I am quite inclined to agree. Boys with a record like that should not undertake to use the Juvenile Court. I see no reason why the Juvenile Court should be used as a refuge for such cases as this seems to be.

"'Well, in view of the situation and the report of the Probation Officer and in view of what appears to be the facts, so far as we know them now, these boys are not in very good standing, having rather bad records.'"

There can be no question but that it is as implicit from the language used by the court that petitioner and his co-defendants are unfit subjects for consideration in the Juvenile Court as it was implicit from the oral findings of the court in Ex parte Etherington, 35 Cal.2d 863, 221 P.2d 942. See also In re Hartman, 93 Cal.App.2d 801, 210 P.2d 53; In re Ortiz, 74 Cal.App.2d 810, 169 P.2d 664.

The writ of prohibition prayed for is denied and the alternative writ issued by the court is discharged.

ADAMS, P. J., and VAN DYKE, J., concur.

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102 Cal.App.2d 233

TAYLOR v. GORDON et al.

BOLANDER v. GORDON et al.

Civ. 14311.

District Court of Appeal, First District, Division 1, California.

Feb. 10, 1951.

Actions by Frederick G. Taylor and by Dorothy Bolander against Irving Gordon and Virginia C. Popoff for injuries sustained when plaintiffs were struck by defendants' automobiles, while plaintiffs were walking across street. The Superior Court in and for the City and County of San Francisco, Sylvain J. Lazarus, J., rendered judgments for plaintiffs, and defendant Popoff appealed. The District Court of Appeal, Peters, P. J., held that trial judge's statement in his instructions to jury that there was no dispute about the fact that the plaintiffs were struck by either one or both of the automobiles driven by the respective defendants, implied only that either one of plaintiffs might have been struck by only one of offending vehicles.

Judgments affirmed.

1. Trial 🔑286

In action for injuries sustained by pedestrians who were struck in street crosswalk by defendants' automobiles which were proceeding in opposite directions, trial judge's statement in his instructions to jury, that there was no dispute about fact that plaintiffs were struck by either one or both of automobiles driven by respective defendants, implied only that either one of plaintiffs may have been struck by only one of offending vehicles, and did not instruct that both plaintiffs were struck by both vehicles, and there was no error in instruction.

2. Trial 🔑285

Instructions to jury must be reasonably construed.

3. Appeal and error 🔑966(1)
Continuance 🔑7

A motion for a continuance is addressed to sound discretion of the trial court, and in absence of showing of abuse, determination of trial court is conclusive.

4. Continuance 🔑6, 35

Where defendants' counsel when he first made motion for continuance, insisted that motion be granted, but as trial progressed, he refused offer of plaintiffs' counsel, that case be continued a week, stating he would rather proceed in absence of his client, and thereafter defendant's counsel agreed to a stipulation that prior testimony could be read, and also requested and secured stipulation that his client if present, would deny certain testimony, and defendant's counsel thereafter made no further mention of motion, trial court could reasonably believe that defendant's counsel had abandoned motion, and even if there was no abandonment, there was no abuse of discretion in denying motion on showing made.

5. Continuance 🔑46(10)

If presence of a defendant is necessary for defense, attorney should make some showing that he is not in possession of all facts and in what way absence of client will prejudice case.

6. Continuance 🔑**45**

Where only showing made by defendant's counsel, in support of his motion for continuance, was counsel's unsworn statement that he had been informed that defendant had measles, statement was not sufficient.

7. Continuance 🔑**46(5, 10)**

An application for continuance should be supported by either affidavits or other valid proof satisfactorily showing necessity for presence of absent party or witness, fact that interest of party will suffer by his absence, and reasonable assurance that party may be present at a future specified date to which trial may be continued, and if postponement is sought to procure evidence of a party to action or other witness, due diligence and materiality of evidence must be shown by affidavits.

◆

Dana, Bledsoe & Smith, San Francisco, for appellant.

Delany, Jarvis, Fishgold & Werchick, Elmer P. Delany and Martin J. Jarvis, all of San Francisco, for respondents.

PETERS, Presiding Justice.

The two plaintiffs, Frederick Taylor and Dorothy Bolander, were injured in an automobile accident that occurred at 24th Avenue and Taraval Street in San Francisco on October 31, 1947. Each plaintiff filed an action naming Irving Gordon and Virginia Popoff as defendants, and charging both defendants with negligence. Contributory negligence was not an issue on the trial, nor is it made an issue on this appeal. The two actions were consolidated for trial. The jury awarded Taylor $10,000 and Bolander $2,000 against both defendants, and judgments on the verdicts were entered in these sums against both defendants. Popoff has appealed from both judgments; Gordon has not appealed, and as to him, the judgments have become final.

On this appeal Popoff does not question the sufficiency of the evidence to support the implied findings that she was negligent and that such negligence proximately caused the accident, nor does she question the sufficiency of the evidence to support the amount of the awards. Her sole contentions are that prejudicial error was committed in one of the instructions given by the court of its own motion, and that error was committed in refusing this defendant a continuance of the trial. There is no merit in either contention.

In order to understand the relevancy of these contentions, brief reference must be made to the facts of the accident. The accident occurred at 24th Avenue and Taraval Street in San Francisco. Taraval Street runs east and west; 24th Avenue runs north and south. Streetcar tracks are located on Taraval Street. On the night of October 31, 1947, at about 5:45 p. m., defendant Popoff was driving easterly on Taraval Street and defendant Gordon was driving westerly on the same street. Both cars were proceeding on their respective sides of the street near its center line. The plaintiffs alighted from a streetcar, westbound on Taraval Street, and waited in what would have been a safety zone, had it been marked, until the streetcar proceeded west. The two plaintiffs, who were acquaintances, then met in the safety zone, walked together to the easterly marked crosswalk on Taraval Street, and proceeded to cross that street, in the crosswalk, in a southerly direction. About the time that the two plaintiffs reached the center of Taraval Street the two cars operated by the respective defendants, and going in opposite directions, passed each other in the crosswalk where plaintiffs were walking. The two plaintiffs were caught between the two cars and each was hit and injured. The evidence shows that the Gordon car hit Taylor, and the Popoff car ran over the foot of Bolander. The evidence, and the reasonable inferences therefrom, are in conflict as to whether the Popoff car hit both plaintiffs, but there is substantial evidence that both automobiles were operated in a negligent fashion and that the joint negligence of the two defendants was the proximate cause of the accident. The injuries suffered by both plaintiffs were substantial.

The trial judge first instructed that he had a lawful right to comment on the facts, but that he did not intend to do so except "to state what you already know, or what has been already admitted." He then described the general nature of the consolidated actions and then stated: "I might also add the fact, which is not disputed and which you already thoroughly know, that this litigation originates from an accident that occurred about a year and a half or two years ago, at or upon the easterly crosswalk of Taraval Street and 24th Avenue. There is no dispute about the fact that the plaintiffs were in the crosswalk at the time that the accident occurred. *There is no dispute about the fact that the plaintiffs were struck by either one or both of the automobiles* driven by the respective defendants, Irving Gordon and Virginia Popoff." (Italics added.)

[1] Appellant contends that by this instruction the jury was told that "There is no dispute about the fact that the plaintiffs were struck by * * * both of the automobiles driven by the respective defendants." She contends that the evidence is in conflict as to whether she hit plaintiff Taylor, and also points out that Taylor testified that he was hit by the Gordon car, and did not testify that he had been hit by the Popoff car. Under such circumstances, she contends that the jury could have found that Taylor's injuries were proximately caused solely by the negligence of Gordon, but, because of the challenged instruction, this issue was wrongfully taken from the jury. Of course, it would have been error for the trial court to have instructed that there was no dispute about an important fact, if that fact was in dispute. Scandalis v. Jenny, 132 Cal.App. 307, 22 P.2d 545; Clarke v. Volpa Brothers, 51 Cal.App.2d 173, 124 P.2d 377. The difficulty with appellant's point is that it misinterprets the instruction, and then bases the claim of error upon such misconstruction. It is an undisputed fact in the case that each of the plaintiffs was hit by at least one of the offending vehicles. There is no doubt from the evidence that the Popoff car ran over the foot and struck the plaintiff Bolander. There is some evidence that Popoff admitted that her car also hit the plaintiff Gordon, although there is conflicting evidence on this issue. Taylor testified that he could only remember being hit by the Gordon car.

[2, 3] Appellant interprets the italicized portion of the instruction as telling the jury that it was undisputed that the Popoff car hit both Taylor and Bolander. To use appellant's own language—(Reply Brief, p. 3): "It is true that the instruction was in the alternative. But it is also true that the Court told the jury that the adoption of either alternative would be upon the basis of undisputed evidence. In other words, the jury was informed that the evidence was all one way to the effect that *either* car struck Taylor (referring to either car indiscriminately) and that the evidence was likewise all one way to the effect that *both* cars struck Taylor." This is a possible but a strained and distorted interpretation of the instruction. Reasonably construed, the instruction clearly implies, if it does not directly state, that either one of the plaintiffs may have been struck by only one of the offending vehicles. To construe the instruction to mean that both plaintiffs were struck by both vehicles the word "either" must be disregarded. Instructions must be reasonably construed. The appellate courts are not permitted to seek out a possible and strained construction of the words used, and then infer that the jury followed that distorted interpretation. We should and must assume that the jury is constituted of reasonable men and women, and that they construed the instructions as would reasonable men and women. So construed, there was no error in the instruction.

The only other point urged is that the trial court abused its discretion in refusing a continuance to the appellant Popoff. Prior to the trial the deposition of Popoff was taken by the plaintiffs, and at that time she testified at length—her deposition covers 18 pages of the transcript—as to her version of the facts of the accident. Also prior to the trial she had testified as to her version of the facts in a criminal proceeding instituted against Gordon, her codefendant. The trial commenced on the morning of March 21, 1949. After the jury was impanelled and the opening statements made, Popoff was called as the first witness for the respondents under section 2055 of the Code of Civil Procedure. At this time she testified in minute detail as to her version of the facts—her testimony covers the first 28 pages of the transcript. Her examination by counsel for respondents concluded at the end of that court day. She was not then examined by her own counsel or by counsel for the other defendant. The next morning—March 22, 1949—counsel for Popoff informed the court that his client had been quarantined with measles and would be in bed two weeks, and suggested that the case go over until his client could be present. Counsel for plaintiffs objected to the trial going over for that length of time, and the trial judge expressed the view that it would be best for the trial to proceed. Respondents' attorney suggested that Popoff's deposition could be read, and that another deposition could be taken, if necessary, at the hospital. Dana, Popoff's counsel, objected to continuing without the presence of his client, but informed the court that the granting or denying the continuance was within the discretion of the court. After some discussion, and upon the insistence of the court, Dana agreed to continue upon the understanding that he was not waiving any of his client's rights. No ruling was then made on the motion for a continuance. The trial then proceeded with medical testimony. Argument on the motion was then renewed in chambers. Dana contended that the testimony of his client given under section 2055 of the Code of Civil Procedure was incomplete, because it was only cross-examination, and that the taking of his client's deposition would be complicated because she was suffering from a communicable disease. He also urged that he had the legal right to consult with his client during the trial. After some discussion, and without a ruling being made on the motion, it was agreed that a doctor selected by respondents' attorney should examine Popoff. Dana again stated that he was not waiving any rights.

On Monday, March 28, 1949, argument on the motion was resumed in chambers. Counsel for respondents suggested that the trial go over a week, at which time it was reasonably probable that Popoff could attend. The trial judge expressed some opposition to this procedure. Dana then offered to take his client's deposition that afternoon, if her doctor would permit. Counsel for respondents offered to stipulate that any portion of the pre-trial deposition of Popoff or her testimony at the criminal trial, or both, could be read by Dana, but Dana stated that there were a few matters in reference to distances that had been brought out in Popoff's testimony under section 2055 about which he wanted to examine his client. There was then some general discussion, and then Dana stated: "I would recommend that we take her deposition [this afternoon], rather than have it go over to Monday, I would rather do that." Later that same day Dana informed the court that he was trying to ascertain whether his client would be available to come to court the next morning, and that he had some reason to believe that she might be able to appear then.

The next morning, Tuesday, March 29, 1949, Dana stated that his client was well enough to appear, but that her doctor believed that there was a chance—a reasonable chance—that she might still be infectious. Thereupon, the following occurred:

> "Mr. Dana: If your Honor please, counsel and I have made some stipulations. Mrs. Popoff is well enough, she thinks, and I am sure she could come to court, but the Doctor believes that there would be some chance, not remote but some reasonable chance that she might still infect someone with whatever measles she has, so Mr. Delany and counsel here have, I think, very generously stipulated that I might read her deposition in its entirety and that I might likewise read whatever testimony she offered on November 4 in a proceeding that we have referred to, at that time when she was a witness, and it was likewise stipulated with counsel that if she were called today that she would testify that she didn't at any time tell Officer Sullivan that she

struck both pedestrians, but she said she came in contact with only the lady and that she would also deny that she had ever said, at least intentionally, that she didn't see the pedestrians until she was approximately opposite them.

"Mr. Delany: It is stipulated that the testimony as outlined in Mr. Dana's statement to the Court would be given, and it may be considered that she has taken the stand and has given that testimony. It will likewise be stipulated that he may read her deposition, as well as that portion or such portions as he may desire of the proceeding that he mentioned.

"Mr. Alaimo: Defendant Irving Gordon so stipulates, too, if your Honor please."

Thereafter, pursuant to this stipulation, Dana read Popoff's pretrial deposition into the record, and also read portions of her testimony given at the criminal trial of Gordon. The trial continued, and no further mention was made of the motion for a continuance. The court, in view of the stipulation, never did rule on the motion.

[4] A motion for a continuance is addressed to the sound discretion of the trial court. That discretion may be abused, but in the absence of a showing of abuse the determination of the trial court is conclusive. Each case must turn upon its own facts. Here there clearly was no abuse of discretion. While Dana, when he first made the motion, was quite firm in his insistence that the motion be granted, as the trial progressed he refused the offer of counsel for plaintiffs that the case be continued a week, stating that he would rather proceed in the absence of his client. Thereafter, he agreed to a stipulation that prior testimony could be read, and also requested and secured a stipulation that Popoff, if present, would deny certain testimony. This appellant took advantage of this stipulation, and thereafter made no further mention of the motion. It is quite apparent that the trial court believed, and reasonably so, that Dana had abandoned the motion. If Dana had not abandoned his motion he should have insisted on a ruling. This he did not do.

[5] Even if there had been no abandonment of the motion there would have been no abuse of discretion in denying it on the showing made. If the presence of a defendant is necessary for the defense, the lawyer should make some showing that he is not in possession of all of the facts and in what way the absence of the client will prejudice the case. Ross v. Thirlwall, 101 Cal.App. 411, 281 P. 714. No such showing was made here.

[6, 7] Moreover, the only showing made by Dana, in support of his motion, was his unsworn statement that he had been informed that his client had the measles. This is not sufficient. In Capital National Bank v. Smith, 62 Cal.App.2d 328, 339, 144 P.2d 665, 671, the court, in discussing the propriety of the denial of an oral motion of a defendant's counsel, supported by the certificates of two doctors, for a continuance because of the illness of his client, stated: "Likewise there is no merit in the contention that the court erred in refusing to grant the motion of defendant Barbara de Bles for a continuance of the trial, which was orally made on June 16th. No affidavits were filed and no oral evidence was adduced in support of that motion. No showing of prejudice to that defendant on account of the denial of said motion was shown. The convenience of numerous attorneys and other interested parties and the expeditious proceedings of the court would have been injuriously affected by that requested continuance. It is true that liberality should be exercised in granting continuances when they are not prejudicial to the interests of other parties to the actions. [Citing cases.] The granting or denial of a motion for continuance of the trial is within the sound discretion of the trial judge, and such an order will not be disturbed on appeal except for an abuse of discretion. [Citing cases.] An application for continuance should be supported by either affidavits or other valid proof satisfactorily showing the necessity for the presence of the absent party or witness; the fact that the interest of the party will suffer by his absence, and reasonable assur-

ance that the party may be present at a future specified date to which the trial may be continued. [Citing authorities.] If the postponement is sought to procure the evidence of a party to the action or other witness, due diligence and the materiality of the evidence must be shown by affidavits. [Citing authorities.] None of the foregoing necessary requirements for the granting of a continuance were complied with."

The judgments appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

In re REIZIAN'S ESTATE.

BALOIAN v. JOHNS et al.

L. A. 21261.

Supreme Court of California, in Bank.
Feb. 16, 1951.

Charles G. Baloian filed a petition in the matter of the estate of Toorig Reizian, deceased, and was opposed by Henry Arten Baloian. The Superior Court of Los Angeles County, Joseph M. Maltby, J., rendered a decree for Henry Arten Baloian, and E. M. Johns, co-administrator, appealed. The Supreme Court, Edmonds, J., held that the evidence supported determination that realty was deceased's separate property.

Decree affirmed.

Prior opinion, 221 P.2d 332.

1. Husband and wife ⚷249

In determining character of property for purpose of applying provisions of Probate Code, regarding succession to community property where there is no issue, and regarding succession to separate property of a deceased spouse, leaving no issue, it is source of acquisition of property, and not nature of its ownership immediately before death, which is controlling. Probate Code, §§ 228, 229.

2. Husband and wife ⚷201

Husband may not set aside wife's transfer of property acquired by her through an instrument in writing. Civ. Code, § 164.

3. Husband and wife ⚷262(1)

Code provision that whenever a married woman acquires property by instrument in writing, it is presumed to be her separate property unless a contrary intention is expressed in instrument, creates no presumption as to source of acquisition of property, and regardless of husband's intent, if it is clear that source of acquisition was either his separate property or community property, upon death of wife whose husband had predeceased her, property standing in her name will be distributed according to provisions of Probate Code, regarding succession to property where there is no issue, and regarding succession to separate property of a deceased spouse, who leaves no issue. Probate Code, §§ 228, 229; Civ.Code, § 164.

4. Husband and wife ⚷264

In probate proceeding, evidence sustained finding that property acquired by deceased during marriage in her name alone, was her separate property and not community property, and realty passed to deceased's father as separate property of deceased. Probate Code, §§ 228, 229; Civ. Code, § 164.

William Kinley and George Wise, Long Beach, for appellant.

Roland G. Swaffield, Long Beach, for respondents.

EDMONDS, Justice.

Khosrof Reizian predeceased his wife Toorig. Real property which was purchased when they were living together as husband and wife is claimed by Henry Baloian, her father, and by the heirs of the husband's mother. The appeal from the decree in favor of Baloian presents for decision the question as to whether the evidence supports the findings in regard to the source of the property.

Khosrof and Toorig were married in 1918. A house and lot, known as the "home place", was purchased in 1936 and conveyed to "Toorig Reizian a married woman". Until the death of Khosrof in 1947, he and his wife resided on this property. Before the administration of his estate was completed, his widow died. In the petition for distribution of her estate, the administrator asked that the residence be distributed in accordance with § 228 of the Probate Code, one-half to Henry Baloian, Toorig's father, and one-half to the estate of Marian Reizian, her mother-in-law. The father objected to the proposed distribution, claiming that the realty passed to him as the separate property of the decedent.

The evidence as to the source of the consideration paid for the real estate may be briefly summarized as follows: Khosrof was a retail merchant; his wife assisted her husband in the operation of his business and carried on her household duties as well. She had no other outside business interests. Prior to her marriage, she owned approximately $2,400 in United States Postal Savings certificates. There is no evidence as to what became of them after her marriage.

The purchase price of the house was $3,300. Thirteen hundred dollars was paid in cash; the balance of $2,000 was represented by a promissory note secured by trust deed were executed by Toorig alone. Approximately three years later, the holder of the promissory note signed a receipt showing that he had received $2,000 from Mrs. Reizian. In 1945 and 1946, she secured policies of insurance upon the property, issued to her as its sole owner.

In 1945, husband and wife executed mutual reciprocal wills at the same time. These wills, identical in language, were prepared by the same attorney. By them, each bequeathed to the other, as the sole beneficiary, all of their property. Each will contained the following statement: "I further declare that all of the property of which I am possessed is community property."

Upon the death of Khosrof, his wife became the owner of certain property, title to which they had held in joint tenancy. She was advised by her attorney as to the necessary data for an affidavit to be used in connection with the determination of inheritance taxes. The attorney then told her that if her husband had paid part of the purchase price of the property here in controversy, perhaps, for tax purposes, she should disclose that fact as the basis for clearing the title at a later time. In that event, the attorney said, the affidavit concerning the community property of herself and her husband which was sent to her for execution should be answered accordingly. Her response was that the attorney knew the source of the money which was paid for the house. "[I]t came from the business", she said. "That's the only place that money would come from."

E. M. Johns, the appellant, is co-administrator of the estate of the husband's mother. He was a close friend of the Reizians for some 30 years. As a witness on behalf of the mother's heirs, he was questioned in regard to a conversation with Toorig in which she discussed her property. His reply was that, "in front of the revenue officer for tax purposes", she was asked, "where this money come from when you buy the house, 160 Laverne, and she admit all the money come from the business on Pine Avenue".

The superior court determined that the realty was the separate property of Toorig, and ordered distribution of the proceeds of its sale to Baloian, the objector, in accordance with § 225 of the Probate Code. From this portion of the decree of partial distribution, Johns has appealed, contending that: (1) There is no substantial evidence to support the determination that the realty was the separate property of Toorig; and (2) The mutual reciprocal wills of the decedents conclusively establish that the residence was community property.

The material portions of § 228 of the Probate Code read as follows: "If the decedent leaves neither spouse nor issue, and the estate, or any portion thereof was community property of the decedent and a previously deceased spouse, and belonged or went to the decedent by virtue of its community character on the death of such spouse, or came to the decedent from said spouse by gift * * *, then one-half of such community property goes to the parents of the decedent in equal shares, or if either is dead to the survivor * * *, and the other half goes to the parents of the deceased spouse in equal shares, or if either is dead to the survivor * * *."

[1] In determining the character of property for the purpose of applying §§ 228 and 229 of the Probate Code, it is the source of its acquisition, and not the nature of its ownership immediately before death, which is controlling. Estate of Abdale, 28 Cal.2d 587, 170 P.2d 918; Estate of Perkins, 21 Cal.2d 561, 134 P.2d 231; Estate of Rattray, 13 Cal.2d 702, 91 P.2d 1042. As the claimant of property which he asserted was the separate property of his daughter, Baloian relies upon

the presumption of § 164 of the Civil Code as proof that its source was the separate property of his daughter. As further evidence of that fact, he points to testimony that the purchase money note and trust deed were signed only by Toorig, the receipt for payment of the note was in her name alone, and two insurance policies were issued to her as the sole owner of the property.

[2, 3] Section 164 of the Civil Code provides that whenever a married woman acquires property by an instrument in writing, it is presumed to be her separate property, unless a contrary intention is expressed in the instrument. The purchase price of such property may have been paid from funds which were her separate estate or from community funds or the separate property of the husband. In the latter event, the husband may or may not have intended to make his wife a gift of his separate property or his interest in the community funds. However, unless he can show the absence of a donative intent, the husband may not set aside a transfer of such property made by his wife e. g., Hogevoll v. Hogevoll, 59 Cal.App.2d 188, 138 P.2d 693; Horsman v. Maden, 48 Cal. App.2d 635, 120 P.2d 92; Durrell v. Bacon, 138 Cal.App. 396, 32 P.2d 644; Estate of Nelson, 104 Cal.App. 613, 286 P.439; Dale v. Dale, 87 Cal.App. 359, 262 P. 339. Regardless of the husband's intent, if it is clear that the source of acquisition was either his separate property or community property, upon the death of the wife whose husband has predeceased her, the property standing in her name will be distributed according to the provisions of § 228 or § 229 of the Probate Code. In other words, § 164 of the Civil Code creates no presumption as to the source of acquisition of property.

[4] The decisive question, then, is whether, excluding the inapplicable presumption, there was any evidence sufficient to sustain the determination that the realty was acquired from Toorig's separate property. The record shows without conflict that at the time of her marriage she had $2,400. Although there is no direct evidence connecting that sum with the purchase of the realty some 18 years later, all documents concerning the property were executed by her alone. The $2,000 purchase money note and the trust deed securing it were executed only by her. The receipt issued upon payment of the note was made out to her. The insurance policies named Toorig as the sole owner, and receipts for the payment of premiums were in her name alone. Although the title to the property gives rise to no presumption as to the source of the funds with which it was purchased, it is nevertheless an evidentiary fact of probative value. In the face of these undisputed facts, an appellate court cannot say that there is no evidence upon which the decree of partial distribution may be sustained.

It is argued that the mutual and reciprocal wills of Khosrof and Toorig constitute an agreement between them that their property was community in nature. But assuming that those wills effected a transmutation of the property here in controversy, they did not change, and could not change, the source of the consideration for its purchase which is the controlling factor in this proceeding.

The decree is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

RUINELLO v. MURRAY.

L. A. 21714.

Supreme Court of California, in Bank.
Feb. 7, 1951.

Rehearing Denied March 8, 1951.

Henry Ruinello sued Dorothy Clune Murray, individually, and doing business as Ninth & Broadway Building for breach of an oral employment contract. The Superior Court of Los Angeles County, William B. McKesson, J., rendered judgment for defendant, and plaintiff appealed. The Supreme Court, Traynor, J., held that defendant was not estopped to set up statute of frauds as a ground of demurrer to plaintiff's third amended complaint.

Judgment affirmed.

Carter, J., dissented.

Prior opinion, 221 P.2d 184.

1. Frauds, statute of ⚷144

A defendant in an action to enforce an oral contract is not estopped from relying on the statute of frauds unless plaintiff will suffer unconscionable injury, or defendant will be unjustly enriched if oral contract is not enforced. Civ.Code, § 1624, subd. 1; Code Civ.Proc. § 1973, subd. 1.

2. Frauds, statute of ⚷149

Complaint by employee against employer for breach of oral employment contract on ground of unconscionable injury suffered because employee had given up other employment, must set forth employee's rights under the contract which he gave up, and show that those rights were so valuable that unconscionable injury would result from a refusal to enforce the oral contract.

3. Frauds, statute of ⚷149

In action on oral employment contract for five years, where plaintiff did not allege consideration or other terms indicating that employment which plaintiff gave up to work for defendant was not permanent or for as long as he chose, court would not conclude that employment he gave up was not at will of either party, and refusal to enforce oral contract for employment with defendant, which contract was also terminable at will of either party, because of statute of frauds, would not result in unconscionable injury. Civ. Code, § 1624, subd. 1; Code Civ.Proc. § 1973, subd. 1.

4. Work and labor ⚷5(1)

No unjust enrichment results when promisee has received reasonable value of his services

5. Frauds, statute of ⚷138(4)

If salary received by plaintiff under oral contract to employ plaintiff for five years, was not equivalent of reasonable value of his services, plaintiff could bring action against employer in quantum meruit for that value to prevent employer's unjust enrichment. Civ. Code, § 1624, subd. 1; Code Civ.Proc. § 1973, subd. 1.

6. Pleading ⚷254

Where three different judges found complaints filed by plaintiff fatally defective as against demurrers which interposed statute of frauds, trial court did not abuse its discretion in sustaining demurrer on that ground to third amended complaint without leave to amend. Civ. Code, § 1624, subd. 1; Code Civ.Proc. § 1973, subd. 1.

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Seymour D. Sommer, Los Angeles, for appellant.

Gibson, Dunn & Crutcher, Frederic H. Sturdy and John T. Pigott, Jr., Los Angeles, for respondent.

TRAYNOR, Justice.

Plaintiff appeals from a judgment of dismissal entered after a demurrer to his third amended complaint was sustained without leave to amend.

Plaintiff alleges that in October, 1945, he and defendant entered into an oral agreement whereby in consideration of plaintiff's giving up a "permanent life-time position" with another employer as engineer and superintendent of the 834 South Broadway Building and taking a similar position with defendant, the owner of the Ninth and Broadway Building in Los Angeles, for the term of five years, defendant would pay plaintiff a monthly salary of $350 plus a yearly bonus of 20% of the gross income in excess of $114,000; that plaintiff had been continuously employed as engineer and superintendent of the 834 South Broadway Building since its erection in 1926 until October 1945, when he resigned to enter the employ of defendant; that plaintiff was personally acquainted with defendant for twenty years and had been previously employed by defendant's deceased husband and by defendant, who were lessees of 834 South Broadway Building from 1933 to 1943; that plaintiff was employed by defendant from December 1, 1945 to February 21, 1948, when defendant summarily discharged him to avoid payment of the bonus; that during the period plaintiff worked for defendant he was able to increase the annual gross income of the building to approximately $263,000. Plaintiff seeks recovery of $11,050, the sum he would have been entitled to receive as salary during the remainder of the employment agreement. He also prays for an accounting of the gross profits and for judgment for 20% of the yearly gross profits in excess of $114,000.

Defendant demurred to plaintiff's original complaint on the ground that the oral agreement, admittedly not to be performed within one year, was within the statute of frauds. (Civ. Code section 1624(1); Code of Civ.Proc. section 1973(1).) The trial court sustained the demurrer to the original complaint as well as the demurrer to the amended complaint. Plaintiff, by stipulation, followed his second amended complaint with a third amended complaint to which a demurrer was sustained without leave to amend.

[1] Plaintiff contends that he has alleged sufficient facts to estop defendant from relying on the statute of frauds. There can be no estoppel unless plaintiff will suffer unconscionable injury or defendant will be unjustly enriched if the oral contract is not enforced. Monarco v. Lo Greco, 35 Cal.2d 621, 220 P.2d 737 and cases there cited. Plaintiff has not alleged facts that meet either of these conditions.

[2, 3] To state a cause of action based on unconscionable injury it is not enough to allege that plaintiff gave up existing employment to work for defendant. Murdock v. Swanson, 85 Cal.App.2d 380, 385, 193 P.2d 81; Standing v. Morosco, 43 Cal. App. 244, 248, 184 P. 954. He must set forth his rights under the contract given up and show that they were so valuable that unconscionable injury would result from refusing to enforce the oral contract with defendant. See, e. g. Seymour v. Oelrichs, 156 Cal. 782, 792, 106 P. 88; Tuck v. Gudnason, 11 Cal.App.2d 626, 627–628, 65 P.2d 88; cf. Wilk v. Vencill, 30 Cal.2d 104, 105–107, 180 P.2d 351. Plaintiff alleges that he resigned a "permanent life-time position" under an oral contract with another employer to enter defendant's employ. This allegation does not show that plaintiff will suffer an unconscionable injury if the oral contract with defendant is not enforced. Ordinarily a contract for permanent employment, for life employment, for so long as the employee chooses, or for other terms indicating permanent employment, is interpreted as a contract for an indefinite period terminable at the will of either party, unless it is based on some consideration other than the services to be rendered. Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 39, 172 P.2d 867; Lord v. Goldberg, 81 Cal. 596, 601–603, 22 P. 1126; Shuler v. Corl, 39 Cal.App. 195, 197–198, 178 P. 535; see cases collected in 35 A.L.R. 1432; Edwards v. Kentucky Utilities Co., 286 Ky. 341, 150 S.W.2d 916, 135 A.L.R. 646. Since plaintiff has not alleged such consideration or other terms indicating a contrary intention, it cannot be concluded that the employment he gave up was not at the will of either party. The leaving of such employment for employment with defendant that is also terminable at the will of either party because of the statute of frauds does not result in unconscionable injury. Murdock v. Swanson, supra; Standing v. Morosco, supra.

[4, 5] Nor are there allegations of facts showing that defendant will be unjustly enriched if the contract is not enforced. Although plaintiff alleges that the gross income of defendant's building was substantially increased as a result of his efforts, he does not allege that the reasonable value of his services was greater than the $350 a month he was paid while working for defendant. No unjust enrichment results when the promisee has received the reasonable value of his services. If the salary he received under the oral contract was not the equivalent of the reasonable value of his services, an action in quantum meruit for that value would prevent any unjust enrichment of defendant. See, Monarco v. Lo Greco, 35 Cal.2d 621, 220 P.2d 737; Long v. Rumsey, 12 Cal.2d 334, 342, 84 P. 2d 146; Restatement, Contracts, § 355, Illustration 1.

[6] Although the deficiencies in plaintiff's complaints were raised in defendant's demurrers, after three attempts he has not

overcome them. The trial court could reasonably conclude that he was unable to do so, and accordingly, it did not abuse its discretion in sustaining the demurrer to the third amended complaint without leave to amend. Wing v. Forest Lawn Cemetery Ass'n, 15 Cal.2d 472, 485, 101 P.2d 1099, 130 A.L.R. 120; Dukes v. Kellogg, 127 Cal. 563, 565, 60 P. 44; Werner v. Hearst Publications, Inc., 65 Cal.App.2d 667, 673, 151 P.2d 308; Thayer v. Magill, 13 Cal.App. 2d 21, 27, 55 P.2d 1272; Whittemore v. Davis, 112 Cal.App. 702, 708–709, 297 P. 640.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

In my opinion the complaint sets forth circumstances showing that plaintiff will suffer an unconscionable injury if the oral contract with defendant is not enforced. It is alleged that plaintiff had been continuously employed as engineer and superintendent of the 834 South Broadway Building in the City of Los Angeles from the time it was erected in 1926 until October 14, 1945; that at the latter date plaintiff was employed under an oral agreement with the owner of the building, Aaron Weinraub, whereby plaintiff had a permanent lifetime job; that plaintiff resigned this position at the request of defendant and in reliance upon an oral agreement with defendant; that the latter agreement provided that defendant would pay plaintiff a monthly salary and a yearly bonus in consideration of plaintiff's giving up his position with Weinraub and taking a similar position with defendant, the owner of the Ninth and Broadway Building, for a term of five years; that plaintiff took over his duties as superintendent and engineer of the defendant's building on December 1, 1945, and performed such duties until February 21, 1948, when defendant discharged plaintiff without cause to avoid the payment of the bonus to which plaintiff was entitled.

The holding of the majority that the foregoing allegations do not state facts which estop defendant from relying upon the statute of frauds is based upon the proposition that a "permanent life-time position" ordinarily means merely an employment for an indefinite period which is terminable at the will of either party and Murdock v. Swanson, 85 Cal.App.2d 380, 193 P.2d 81, and Standing v. Morosco, 43 Cal.App. 244, 184 P. 954, are cited as authority for the conclusion that "The leaving of such employment for employment with defendant that is also terminable at the will of either party because of the statute of frauds does not result in unconscionable injury."

The complaint in the Standing case alleged that the plaintiff, at the defendant's request, gave up his employment and sold his home and furniture in New York and moved to Los Angeles in order to enter the defendant's employ in the latter city. The decision that a cause of action based upon an unconscionable injury had not been stated appears to have been based upon an erroneous conception of the proper construction of the pleadings. See Code Civ. Proc., § 452; Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 42, 172 P.2d 867; Buxbom v. Smith, 23 Cal.2d 535, 542, 145 P.2d 305. From the premise that "Assuming against the pleader, as we must, all facts reasonably consistent with the facts alleged, but adverse to the plaintiff," 43 Cal. App. at page 248, 184 P. at page 956, the court concluded that no serious detriment to the plaintiff would result from its refusal to enforce the contract with the defendant. It was surmised that perhaps the plaintiff had sold his property in New York at a profit and that possibly he preferred to live among the ranks of the unemployed in Los Angeles. Directly contrary to that decision on substantially similar facts is Kaye v. Melzer, 87 Cal.App.2d 299, 197 P.2d 50.

Even if it be assumed that the result reached in the Standing case was proper on the ground that sufficient facts had not been set forth with regard to the New York employment which had been given up, the complaint in the present case is not deficient in that respect. As stated above, plaintiff alleged that he had been continuously employed for 19 years in his previous position with the 834 South Broadway Building and that this employment was to continue at least indefinitely.

Murdock v. Swanson, supra, was an action upon an oral contract to make a will. The complaint alleged that the plaintiff had sold her business in order to devote her time to performing services for the decedent. In holding that facts were not alleged which indicated that a serious change of position had taken place, it was said that the allegation with regard to the plaintiff having sold her business was insufficient because it was not asserted that the decedent requested or knew of the sale. But see Wilk v. Vencill, 30 Cal.2d 104, 108, 180 P.2d 351, where this requirement is repudiated; see, also, Tuck v. Gudnason, 11 Cal.App.2d 626, 64 P.2d 88. Again, even if the Murdock case merits approval on its facts, it furnishes no precedent for the present case. It is alleged here in considerable detail that plaintiff gave up his prior employment at the request of defendant.

The fact that plaintiff's employment agreement with Weinraub may have been terminable at will does not compel the conclusion that he will not suffer serious detriment if his contract with defendant is not enforced. In the first place, it is, I submit, a matter of common knowledge that one who has been employed in the same position for a number of years has performed satisfactory services, enjoys the good will of his employer, and will not ordinarily be discharged without good cause. In this respect plaintiff's change of position was not materially different from that involved in Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88. While plaintiff's rights under his contract of employment with Weinraub may not have been as definitely defined as those fixed by the former contract of the plaintiff in the Seymour case, yet in a very real sense plaintiff has given up substantially the same thing.

The decisions holding that an action to recover damages may be predicated upon an intentional and unjustifiable interference with a contract terminable at will, Speegle v. Board of Fire Underwriters, supra, 29 Cal.2d 34, 39–40, 172 P.2d 867, and cases cited; Romano v. Wilbur Ellis & Co., 82 Cal.App.2d 670, 673, 186 P.2d 1012; see Prosser, Torts, pp. 981–982, indicate that the loss of such a contract *does* involve a serious detriment. Particularly is this true with respect to employment contracts—the means by which the great majority of people earn a living. Thus, the severe individual hardships resulting from unemployment and the national problems thereby created were recognized by Congress in enacting the Social Security Act of 1935. Steward Machine Co. v. Davis, 301 U.S. 548, 586–587, 57 S.Ct. 883, 81 L.Ed. 1279. That the giving up of employment of long duration, as is here alleged, is not a matter of great importance to the employee, and a serious change of position on his part, is, in my opinion, a highly unrealistic conclusion.

The majority opinion cites Wilk v. Vencill, 30 Cal.2d 104, 180 P.2d 351, as an example of the showing necessary to establish an estoppel to rely upon the statute of frauds. The only substantial change of position there was that the plaintiff gave up an opportunity to purchase another house in the neighborhood in reliance upon the defendant wife's oral consent to an agreement to sell the defendants' house to the plaintiff, it being alleged that there were no other houses available in the vicinity. If such a comparatively slight inconvenience or the mere loss of a desirable opportunity, rather than the termination of an agreement relating to one's very means of livelihood, is the proper test of unconscionable injury, then plaintiff has also brought himself within that rule. The complaint alleges that plaintiff informed defendant in September, 1945, that he planned to remain on his job at the 834 South Broadway Building for another five years, at which time he expected to retire; "that the defendant then stated to the plaintiff that if he desired to work for five years only that would be agreeable to her and that if he would accept the position (with defendant) they could both retire at the end of five years." From the additional allegations that plaintiff resigned his position with Weinraub and accepted defendant's offer and that plaintiff was discharged by defendant in February, 1948, it is evident that Ruinello's plan to retire in 1950 has been frustrated if the oral contract with defendant is not to be enforced, just as the desire of the plaintiff Wilk to acquire a home in one neighborhood would have been frustrated if his oral agreement had not been enforced.

In my opinion the change of position alleged here is at least as serious as those involved in Wilk v. Vencill, supra, Vierra v. Pereira, 12 Cal.2d 629, 86 P.2d 816; Wilson v. Bailey, 8 Cal.2d 416, 65 P.2d 770; Frey v. Corbin, 84 Cal.App.2d 536, 191 P.2d 21; Beverly Hills Nat. Bank & Trust Co. v. Seres, 76 Cal.App.2d 255, 172 P.2d 894, and Holstrom v. Mullen, 84 Cal.App. 1, 257 P. 545.

I would, therefore, reverse the judgment.

Rehearing denied; CARTER, J., dissenting.

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36 Cal.2d 722

SAMUELSON et al. v. PUBLIC UTILITIES COMMISSION OF STATE et al.

S. F. 18165.

Supreme Court of California, in Bank.

Feb. 9, 1951.

Rehearing Denied March 8, 1951.

Petition by Gordon A. Samuelson and Gilbert J. Munson, co-partners, for a writ to review an order made by the Public Utilities Commission of the State of California, and others ordering petitioners to cease and desist from highway common carriage until they obtained a certificate of public convenience and necessity. The Supreme Court, Edmonds, J., held that petitioners freight business had been improperly classified as a common carrier.

Order annulled.

1. Carriers 🔑4

One who holds himself out to world as a common carrier, who undertakes generally and for all persons indifferently to carry goods and deliver them for hire, and whose public profession of his employment is such that if he refuse, without some ground, to carry goods for any one, in course of his employment and for a reasonable and customary price, he will be liable to an action, is a "common carrier".

See publication Words and Phrases, for other judicial constructions and definitions of "Common Carrier".

2. Carriers 🔑4

One who offers to carry goods for any person between certain termini and who is bound to carry for all who tender their goods and price of carriage, is a "common carrier".

3. Carriers 🔑4

Where freight line operators had not made an irrevocable dedication of its property to a public use, such as exercise of sovereign power of state in eminent domain, in order to bring operators within purview of statutes regulating common carriers, it must have been made to appear that they had voluntarily devoted their transportation facilities to indiscriminate use of public for hire, thus constituting them common carriers. Gen.Laws, Act 6386, §§ 2(*l*, dd, ff), 2¾(a), 50¾(a–c); Gen.Laws, Act 5129a, § 1(g–i).

4. Automobiles 🔑76

Where trucking concern, originally certified as a highway contract carrier, provided daily freight service between San Francisco and Oakland and nearby towns over public highways, under contract arrangements with some 30 shippers, and carrier did not solicit business but its avowed purposes were to restrict and limit operations, and carrier could have carried more freight than was accepted, but other business was excluded, trucking concern was not a "common carrier" subject to statutory restriction as such. Gen.Laws, Acts 5129a, 6386.

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Scott Elder, San Francisco, for petitioners.

Everett C. McKeage, Boris H. Lakusta, J. Thomason Phelps and Wilson E. Cline, all of San Francisco, for respondents.

EDMONDS, Presiding Justice.

For some years, Gordon A. Samuelson and Gilbert J. Munson, partners doing business as Circle Freight Lines, have held a certificate issued by the Railroad Commission of this state authorizing them to do business as a highway contract carrier. In a complaint filed with the successor commission by a railroad association and certain trucking corporations, the partners are charged with having operated as a common carrier without authority to do so. After a hearing, they were ordered to cease and desist from highway common carriage until they should obtain a certificate of public convenience and necessity.

In attacking this order by writ of certiorari, Samuelson and Munson assert that, as a matter of law, the uncontradicted evidence shows no violation of their permit. They also contend that the commission erroneously placed upon them the burden of proving that they conducted their business with "substantial restrictiveness". Aside from the question of the burden of proof, that limitation is challenged as being too indefinite to be applied with any certainty by a trucker who is endeavoring to avoid classification as a common carrier.

The following relevant facts are practically undisputed:

In 1946, the petitioners engaged in the business of transporting property for hire, by auto truck over public highways, providing daily service between San Francisco and Oakland and nearby towns. With less frequency, they carried freight between the bay area and other places not more than 50 miles away. The commission found that all of the service was of a permanent or indefinitely continuing nature. The entire operation was performed as a single, integrated business unit, with a common use of personnel, equipment and facilities.

Approximately three-fourths of the freight handled comprised electrical goods, drugs and liquors in equal portions. The remainder consisted of a variety of other commodities. None of the traffic presented unusual features, and no such service was performed. The physical facilities and equipment used, the schedules observed, and the rates charged were substantially the same as those of a common carrier.

For some months prior to the hearing, about 30 firms, on the average, were served. Where a customer dropped out for any reason, it was replaced by another, the total remaining at a fairly constant level. Altogether, 47 shippers had been or were being served by the partnership.

The partners did not solicit business. Their avowed purpose from the beginning was to restrict their operations, and the limit of 30 shippers was chosen after consideration of conflicting opinions from private counsel and members of the Public Utilities Commission. That limitation was adopted in good faith and not with a view to evade the law. In fact, it appears that the petitioners scrupulously sought at all times to stay within the law and to abide by the dictates of the commission. The petitioners' trucks could have carried more freight than was accepted. In selecting shippers, those were chosen who offered a substantial volume of tonnage, moving regularly, and whose business was considered profitable and convenient to the partners' operation. All other business was rigidly excluded.

Contractual arrangements with the shippers were nebulous in the beginning. Gradually oral agreements were entered into. At a later time, the partners obtained a written contract in a standard form with all but three of their customers. These three entered into an oral contract to the same effect as the one in writing.

The terms of the written contract required the shipper to tender, and the carrier to transport, for a specified period, and at the minimum rates prescribed by the commission, all shipments of designated commodities moving between specified points. There were provisions in regard to liability for loss or damage and respecting performance of service. The carrier exacted compliance with these terms and, on several occasions, terminated a contract because of failure to carry out its provisions. Also, the petitioners insisted on receiving payment only from those with whom it had a contract.

The operation was primarily a family one, with the partners, related by marriage, doing the driving, and their wives performing the office work. In addition, one full-time and one part-time driver were employed.

From the beginning of the operation, the petitioners held a contract carrier permit issued as a matter of course. About a month prior to the filing of the complaint against them, they filed an application seeking a certificate of public convenience and necessity to operate as a highway common carrier between the points named.

Upon findings substantially in accordance with these facts, the commission held that there were no elements of restrictiveness which would indicate an intention to limit the scope of the operations. It said: "There is nothing unusual about the character of equipment used; the commodities transported present no unusual features, being those normally handled by common carriers; the drivers perform no unusual duties which differ from those ordinarily provided by the employees of common carriers, nor have they undergone any special course of training; no services are afforded in the handling of commodities which differ from those usually supplied by common carriers; the operation closely resembles the scheduled service performed by a common carrier; and the rates observed are uniform in their application among the shippers. Clearly, in none of these respects is there any substantial departure from the kind of operation normally supplied by a common carrier."

The determination as to lack of "substantial restrictiveness" was also placed upon the ground that the partners had not sufficiently limited their operations. The fact that they had chosen their shippers and endeavored to curtail the number of them was said to be immaterial. The commission also characterized as of no importance the evidence that there had been no development of business by solicitation and the refusal of proffered tonnage when there was space to carry it.

On the other side of the scales, the commission placed the partners' willingness, whenever shippers dropped out, to fill the ranks with new ones, the standard form of agreement, and the extension of service to shippers who had no individual or specialized requirements for the transportation of their products. Also, the practice of requiring the shippers to fulfill the obligations under their contracts and the cancellation of them upon a failure to do so were declared to be factors against common carriage. "Viewed against the background of the surrounding facts and circumstances", the commission concluded, "the number of shippers served * * *, now aggregating some thirty-two, is too large, we believe, to permit lawful operation as a private carrier." The partners were ordered to immediately discontinue service under their contract carrier permit. However, concurrently with that order, the commission issued a certificate of public convenience and necessity allowing the petitioners to operate as a highway common carrier between some, but not all, of the points which they were found to have served without authority.

In challenging the decision and order, the petitioners contend:

(1) The commission exceeded its jurisdiction in making its cease and desist order and by doing so deprived them of their property without due process of law in violation of § 13 of Article I of the California Constitution and the 14th Amendment of the Constitution of the United States. In support of this charge, it is argued that the decision is unsupported by any evidence that they operated trucks or transported property as a highway common carrier. All of the evidence, the petitioners assert, requires a finding that they denied service to the public and operated exclusively as a highway contract carrier.

(2) The decision, order, and determination are capricious and arbitrary in that they are contrary to the applicable statutes and at variance and inconsistent with the commission's instructions to the petitioners and its specifications of the characteristics of the several classes of highway carriers made generally by circular and otherwise.

(3) The negative finding of the commission of "lack of substantial restrictiveness"

is based upon concepts arbitrarily injected into the subject by the commission without statutory or other authority. The criteria applied by the commission in its decision are illegal and capricious.

By answer, the commission contends that the one issue presented in this proceeding is the soundness of the definition and distinction applied by it to distinguish between highway common carriage and highway contract carriage. It is argued that the decision in Pacific Southwest R. R. Assoc. v. Nielsen, 49 Cal.P.U.C. 261, for the first time put into wholly articulate form the legislative concepts concerning the regulation of highway carriers. Assuming the soundness of the rule stated in the Nielsen case, the next question, says the commission, is whether it properly applied the rule to the facts shown in the present proceeding.

The commission categorically denies that it has ever deviated from the test of a holding out of service to the public in preference to some other theory. The term "holding out to serve the public or any portion thereof", says the commission, necessarily compels the inquiry whether the carrier has limited or restricted its service. If he has not done so, of necessity he must be deemed to have held out his service to the public indifferently and is a common carrier.

The Public Utilities Act, Stats. 1915, ch. 91, p. 115, as amended, Deering's Gen. Laws 1943, Act 6386, provides: "The term 'common carrier,' when used in this act, includes every railroad corporation; street railroad corporation; express corporation; freight forwarder; dispatch, sleeping car, dining car, drawing-room car, freight, freight-line, refrigerator, oil, stock, fruit, car loaning, car renting, car loading and every other car corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, operating for compensation within this State * * *." § 2 (*l*). "The term 'public utility,' when used in this act, includes every common carrier, * * * where the service is performed for or the commodity delivered to the public or any portion thereof." § 2 (dd). "The term 'public or any portion thereof' as herein used means the public generally, or any limited portion of the public * * * for which the service is performed or to which the commodity is delivered, and whenever any common carrier * * * performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such common carrier * * * is hereby declared to be a public utility subject to the jurisdiction, control and regulation of the commission and the provisions of this act. * * *" § 2 (ff).

In 1935, the Public Utilities Act was amended by the addition of two sections reading as follows:

"The term 'highway common carrier' when used in this act means every corporation or person * * * owning, controlling, operating or managing any auto truck, or other self-propelled vehicle not operated upon rails, used in the business of transportation of property as a common carrier for compensation over any public highway in this State between fixed termini or over a regular route * * *." § 2 ¾ (a).

"No highway common carrier shall hereafter operate or cause to be operated any auto truck, or other self-propelled vehicle not operated on rails, for the transportation of property as a common carrier for compensation on any public highway in this State except in accordance with the provisions of this act." § 50 ¾ (a). The same section includes provisions for the supervision and regulation of highway common carriers by the Railroad Commission, § 50 ¾ (b), the issuance and regulation of certificates of public convenience and necessity by the commission, and the investigation by the commission of violations of the statute. § 50 ¾ (c).

The Highway Carriers' Act, which became effective in 1935, Stats. 1935, ch. 223, p. 878, as amended, Deering's Gen.Laws, 1949 Supp.Act. 5129a, defines certain terms as used in it as follows:

Highway Common Carrier, "* * * every highway carrier operating as a common carrier subject to regulation as such by the Railroad Commission under the Public

Utilities Act of the State of California as amended." § 1 (g).

Radial Highway Common Carrier, "* * * every highway carrier operating as a common carrier not heretofore subject to regulation as such by the Railroad Commission under the Public Utilities Act of the State of California, as amended." § 1 (h).

Highway Contract Carrier, "* * * every highway carrier other than a highway common carrier as defined in subsection (g) and every radial highway common carrier as defined in subsection (h)." § 1 (i).

Clearly neither the Public Utilities Act nor the Highway Carriers' Act defines the term common carrier, and both of these statutes adopt the common law distinctions between common and contract carriage. The parties agree on this major premise.

[1-3] The term "common carrier" has been considered in many decisions of this court. In one of them it was said: "In his work on Carriers, Mr. Moore, at page 20, vol. 1, defines a common carrier as: 'One who "holds himself out as such to the world; that he undertakes generally and for all persons indifferently to carry goods and deliver them for hire; and that his public profession of his employment be such that, if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action."' It is one who offers to carry goods for any person between certain termini and who is bound to carry for all who tender their goods and the price of carriage. * * * The record discloses no action on the part of either petitioner which constitutes an irrevocable dedication of its property to a public use, such as the exercise of the sovereign power of the state in eminent domain. * * * Hence, in order to bring petitioners within the purview of the provisions under consideration, it must have been made to appear that they had voluntarily devoted their transportation facilities to the indiscriminate use of the public for hire, thus constituting them common carriers." Associated Pipe Line Co. v. Railroad Commission, 176 Cal. 518, 522, 523, 169 P. 62, 63, L.R.A.1918C, 849. To the same effect is Forsyth v. San Joaquin Light & Power Corp., 208 Cal. 397, 404, 281 P. 620.

In People v. Duntley, 217 Cal. 150, 163-164, 17 P.2d 715, 720, which concerned the question of whether the defendant was a common carrier and as such liable for a gross receipts highway transportation tax, the court said: "We come now to the question whether the defendant, notwithstanding the findings of the court, is under the facts a common carrier in law. Neither the Constitution nor section 3664aa of the Political Code, nor the Auto Stage and Transportation Act, defines the term common carrier used therein. Section 2168 of the Civil Code defines a common carrier as follows: 'Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry.' Section 2169 provides: 'A common carrier must, if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry.' Then follow sections 2170 to 2209, inclusive, of the Civil Code defining the duties, rights, and liabilities of a common carrier. This court has followed the statutory definition. Walther v. Southern Pac. Co., 159 Cal. 769, 116 P. 51, 37 L.R.A.,N.S., 235. It has also approved the definition of Moore on Carriers, p. 20, vol. 1 (1st Ed.); vol. 1(2d Ed.) p. 22, as one who 'holds himself out as such to the world; that he undertakes generally and for all persons indifferently to carry goods and deliver them for hire; and that his public profession of his employment be such that if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable in an action.' Associated Pipe Line Co. v. Railroad Comm., 176 Cal. 518, 522, 169 P. 62, L.R.A.1918C, 849. 'The authorities recognize two classes of carriers, viz., private carriers and common carriers. All persons who undertake for hire, to carry the goods of another, belong to one or the other of these classes. * * * The former are not bound to carry for any reason unless they enter into a special agreement to do so. The latter are bound to carry for all who offer such goods as they are accustomed to carry and tender reasonable compensation for carrying them, and if they refuse to perform their obligation in this respect, they are liable to respond in damages. Private carriers are such as carry for hire and do not come within the definition of a common carrier.' 4 R.C.L. p. 549, and cases cited. 'A common carrier has been defined to be one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place. The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently; and hence he is regarded, in some respects, as a public servant. In order to impress upon one the character and impose upon him the liabilities of a common carrier, his conduct must amount to a public offer to carry for all who tender him such goods as he is accustomed to carry. The definition has not always been thus restricted, but the law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have not expressly assumed that character, or by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it.' 4 R.C.L., p. 546, and cases cited."

The United States Supreme Court reversed a decision of this court that a state can constitutionally affix to the privilege of the use of the state highways by private carriers the condition precedent that the private or contract carrier must assume against his will the duties and liabilities of a common carrier. Such a requirement was held to be violative of the due process clause of the Fourteenth Amendment. The court said "The court below seemed to think that, if the state may not subject the plaintiffs in error to the provisions of the act in respect of common carriers, it will be within the power of any carrier, by the simple device of making private contracts to an unlimited number to secure all the privileges afforded common carriers without assuming any of their duties or obligations. It is enough to say that no such case is presented here, and we are not to be understood as challenging the power of the state, or of the Railroad Commission under the present statute, whenever it shall appear that a carrier, posing as a private carrier, is in substance and reality a common carrier, to so declare and regulate his or its operations accordingly." Frost Trucking Co. v. Railroad Commission, 271 U.S. 583, 599, 600, 46 S.Ct. 605, 609, 70 L.Ed. 1101.

Subsequently, in Stephenson v. Binford, 287 U.S. 251, 267, 268, 53 S.Ct. 181, 77 L.Ed. 288, the Frost case was explained in connection with the consideration of a Texas statute. It was then said that, as construed by this court, the California statute required the Frost Trucking Co. to assume the status of a common carrier and submit to regulation as such, although the operator restricted his business to that of a private contract carrier. By its terms, the Texas statute dealt only with private contract carriers. Although the legislation imposed regulations upon them, the statute did not obligate the private carrier to dedicate its property to the business of public transportation and subject it to the duties and burdens imposed upon the common carrier. The decision in the Frost case might have been different, the United States Supreme Court declared, had the California statute not been interpreted by this court to impose upon a private contract carrier the status of the common carrier.

[4] In the present case, it is not necessary to decide the extent of regulation to which a private contract carrier may or should be subjected. California has no statute such as that considered in the Stephenson case; the question is simply whether the Public Utilities Commission has properly classified the Circle Freight Lines as a common carrier.

In Pacific Southwest R. R. Assoc. v. Nielsen, 49 Cal.P.U.C. 216, it was charged that the respondent was operating as a highway common carrier without authority between certain points. Nielsen contended that his operations were those of a highway contract carrier. The commission found to the contrary and issued a cease and desist order. The basic issue in the proceeding was stated by the commission as follows: "It is only a question of defining a highway common carrier and a highway contract carrier in terms precise enough that the division line between them can be readily discerned in the majority of cases upon a reasonable examination of the facts." (At p. 218.) Although recognizing the fact that no absolute or mathematical test could be devised, the commission said that its opinion "may serve to draw together many of the untied threads in the pattern of regulation in the trucking field and place upon a surer footing the public understanding of the views which this Commission entertains". (At p. 218.)

In reaching its conclusions, the commission said that the Public Utilities Act and the Highway Carriers' Act have adopted the common law distinction between common and contract carriage. The basic distinction between contract carriage and common carriage, it held, is the presence or absence of the performing of service for the public generally or any limited portion thereof. Whether there has been a holding out of such service is to be determined by an objective test which may or may not be consistent with the carrier's subjective intent. Without some degree of restrictiveness in a carrier's service, there can be no contract carriage. The quantum of restrictiveness must be substantial and considerable, and highway contract carriage, because of its essentially private quality, can obtain only in a relatively few instances.

"Substantial restrictiveness", which is an essential ingredient of highway contract carriage, the commission declared, may consist in the number of shippers served, or in the physical attributes of the operation or in a combination of both factors. But where the sole element of restrictiveness lies in the number of shippers served, such number must be extremely limited to stay within the realm of contract carriage. There must also be present circumstances indicating a stability in the identity of shippers, a continuity of service on substantially the same plane over a period, and a subjective intent consistent with restrictiveness of service. Mere efficiencies or conveniences of service do not suffice. And even where there is "substantial restrictiveness" in the physical attributes of an operation, service to too large a group may destroy the private character of the operation and make it common carriage.

The question as thus narrowed by the commission largely eliminates the factor of a dedication or holding out of service to the public or a portion thereof. Although recognizing that by statute a public utility "includes every common carrier, * * * where the service is performed for or the commodity delivered to the public or any portion thereof", § 2(dd), Public Utilities Act, it does not apply that test when considering the scope of a permittee's operations. In defense of its position, the commission points out that, almost without exception a carrier seeking to avoid common carrier status says that he has not and does not intend to hold his service out to the public and, in fact, refuses to do so in connection with some customers. Such conduct, the commission holds, does not keep him from being a common carrier.

However, the common law test of common carriage, as repeatedly stated by this court, requires an unequivocal intention to dedicate property to a public use. The "substantial restrictiveness" doctrine excludes this intention, or at least reduces it to only incidental importance. Furthermore, although the question of the carrier's intention is a primary factor in determining the character of carriage under the common law rule, the commission refuses to consider intent as tending to prove that status except where it happens to coincide with the determination that there was "substantial restrictiveness" in operations. Otherwise stated, intent is not a determinative factor in the event that it coincides with "substantial restrictiveness" and contract carrier status but it may be of decisive importance in favor of common carrier status, regardless of other evidence which would justify, if not compel, a different conclusion.

The order is annulled.

GIBSON, C. J., SHENK, P. J., and CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

Rehearing denied; TRAYNOR and SPENCE, JJ., dissenting.

OWSLEY et ux. v. HAMNER et al.

L. A. 21295.

Supreme Court of California, in Bank.

Feb. 9, 1951.

Don G. Owsley and Otille K. Owsley, his wife, brought an action against Jack Hamner, also known as J. M. Hamner, Jr., doing business under the fictitious firm name of Hamner & Son, and others, for a judicial declaration of their rights under a written lease. The Superior Court, Los Angeles County, A. K. Wylie, J., rendered judgment for the defendants, and plaintiffs appealed. The Supreme Court, Carter, J., held that evidence supported finding that passageways and patio were reasonably necessary for defendants' full enjoyment of the leased premises.

Judgment affirmed.

Prior opinion 219 P.2d 888.

1. Landlord and tenant 🔑124(1)

A lease of a part of a building passes with it, as an incident thereto, everything necessarily used with, or reasonably necessary to, enjoyment of the part demised. Civ.Code, § 820.

2. Landlord and tenant 🔑124(1)

Where a storeroom is leased, everything then in use for the storeroom as an incident or appurtenance passes by the lease. Civ.Code, § 820.

3. Landlord and tenant 🔑124(1)

A lease of a particular part of a building gives lessee no rights outside of that part, except those that were intended to be included as appurtenant to beneficial enjoyment thereof, or such as it was manifest had been designed and appropriated for benefit of leased premises.

4. Landlord and tenant 🔑124(1)

Everything which belongs to demised premises or is used with, and appurtenant to, them, and which is reasonably essential to their enjoyment, passes as an incident to them unless specially reserved.

5. Landlord and tenant 🔑124(2)

Where tenants enjoyed use of an adjoining passageway and patio adjacent to their storeroom their use constituted an implied easement which was an implied part of the lease.

6. Easements 🔑15

Purpose of doctrine of implied easement is to give effect to actual intent of parties to a lease or conveyance of realty as shown by all facts and circumstances.

7. Easements 🔑15

An implied easement will arise where it is reasonably necessary for beneficial enjoyment of leased realty, and not only where it is absolutely necessary to make leased property tenantable, and same test applies whether implied easement arises from a conveyance or a lease of realty.

8. Landlord and tenant 🔑124(2)

In landlords' action for declaration of their right to close passageway and patio adjacent to tenants' storeroom, evidence sustained finding that passageways and patio were reasonably necessary for beneficial enjoyment of tenants' storeroom.

9. Trial 🔑375

In action for declaration of landlords' rights under a lease, trial judge's observation after viewing premises and observing physical arrangement was evidence in the case, and physical circumstances would speak for themselves.

10. Landlord and tenant 🔑124(1)

In landlords' action for declaration of their rights to close passageway and patio on leased premises adjacent to tenants' storeroom, inference arose that it would be advantageous that storeroom, which had entrances and display windows on passageway, received some benefit from many customers who were obtained from those passing by entrances and display windows along the passageway.

11. Easements ⚷15

Easements do not fail to be necessary merely because there are other means of access, and they do not have to be the only means of access.

12. Landlord and tenant ⚷124(2)

Where a substantial reduction in value of leased property by elimination of passageway and patio would result because abuse of property and its value were directly related, passageways and patio were reasonably necessary for full enjoyment of the leased premises.

13. Landlord and tenant ⚷124(2)

In landlords' action for declaration of their rights to close passageway and patio on leased premises adjacent to tenants' storeroom, evidence that subtenant of one tenant did not use windows along passageway for display purposes because of some damage to merchandise, and that "pulling power" of display window was insignificant, and that doors on patio were locked and had not been used, created a question for the trier of fact as to whether passageway was necessary.

14. Landlord and tenant ⚷150(3)

Where lessors under lease had right to enter into and upon premises for purpose of inspection and maintaining building and making repairs, alterations or additions thereto, without any rebate of rent to lessee for any loss of occupancy or quiet enjoyment of premises, lessors were only authorized to enter leased premises for purpose of making those repairs in accordance with their duty of keeping building in good repair.

15. Landlord and tenant ⚷150(3)

Where lessors reserved right in lease at all reasonable times to enter into and upon premises for purpose of inspecting them and to maintain "building" and to make repairs, alterations or additions thereto, quoted word meant those parts which lessors were obligated to maintain, and did not mean that they would make alterations of building which would substantially or permanently destroy leased premises, or easements which were a part thereof and appurtenant thereto.

See publication Words and Phrases, for other judicial constructions and definitions of "Building".

16. Landlord and tenant ⚷130

A provision in a lease must be given a reasonable construction to avoid impairment of the covenant of quiet enjoyment.

17. Appeal and error ⚷1071(5)

Where lessees had an easement which prevented lessors' proposed alteration upon factors other than light and air, finding that patio on premises had to remain open to the sky on the ground of an implied easement for light and air would be treated as surplusage, since there are no implied easements for light and air.

18. Landlord and tenant ⚷53(2)

Where easements arose from written lease, and were open, obvious, apparent and permanent in nature when landlords purchased realty, landlords could not claim lack of notice and that judgment which declared easements to exist was a fraud on them.

19. Declaratory judgment ⚷369

In landlords' action for declaration of their rights to close passageway and patio on leased premises adjacent to tenants' storeroom, where findings were sufficient to support judgment for tenants, failure to find that all area of way and patio was used with premises was not error.

◆

George R. Maury, S. L. Kurland and Alden F. Houck, all of Los Angeles, for appellants.

Murchison & Myers, R. Bruce Murchison, John Bricker Myers and Claude B. Cumming, all of Los Angeles, for respondent.

CARTER, Justice.

This is the second appeal in this case, see Owsley v. Whelan Drug Co., Inc., 83 Cal.App.2d 454, 189 P.2d 50.

Plaintiffs are the owners of a two-story business building at the northwest corner of the intersection of Kinross Avenue, a street running east and west, and Broxton Avenue, a street running north and south in University Village, Westwood Hills, Los Angeles County. They acquired the property by purchase in 1945. The street level floor of the building consists of a store at the southeast corner of the building facing east on Broxton, and south on Kinross, referred to as store No. 1. Also facing south on Kinross are stores No. 3 and No. 4, the latter on the west side of the building. The portion of the building—store No. 2—leased to defendant by plaintiffs' predecessor, is the north side thereof, facing east on Broxton. Between stores No. 1 and No. 3 a passageway extends from Kinross north to the center of the building and store No. 2, where it turns east and runs between stores 1 and 2 to Broxton. At the turn or elbow the area is enlarged into what is referred to as a patio which is open to the sky through the second story of the building. The remainder of the passageway is covered by the second story. The passageways and patio are permanent in character and designed as such.

In June, 1929, plaintiffs' predecessor-owner of the building, executed as lessor, a lease to defendant of store No. 2 for men's furnishings business describing it as: "That certain store space on the first floor of the University Professional Building, situated on the Northwest corner of the intersection of Broxton Ave., and Kinross Ave., in University Village, Westwood Hills, County of Los Angeles, State of California, said store premises hereby leased having total square footage of approximately 3,000 sq. feet and frontage of approximately thirty (30) feet on Broxton Ave., just North of the entrance to Building, store including mezzanine and basement and running through to the alley. Also room 17 x 18 to be used as shoe store. Also approximately 440 sq. feet on second floor to be used as tailoring shop or executive offices as long as the business shall warrant same in the judgment of lessee * * *."

It is recited in the lease, and such was the fact when the lease was made, that the building in which the leased premises were located, was under construction by the lessor and the latter agreed, that in "* * placing wiring, arranging entrances, stairway to the mezzanine, ventilators, plumbing electrical outlets, fixtures etc. their architect will cooperate with the architect of the lessee, so as to conform to lessee's plan for the placing of store fixtures. Also to install oak plank flooring, window-backs, windows and lighting fixtures as per sketches to be supplied by lessee; to fir down to all cabinets, and install all partitions and closets, steam heat and hot water, electrical outlets where required, fireplace (imitation) and gas connections, two toilets and one shower." The lease provided for a rental consisting of a percentage of the proceeds from the business conducted on the premises and the usual covenant of quiet enjoyment.

The court found that prior to the execution of the lease, negotiations were had between defendant-lessee and the owner. Defendant inspected the building while under construction, was shown the blueprints governing the construction, and the building was so constructed with the passageways, patio and display windows and entrances as heretofore mentioned, and has existed in that manner to the present. Thus, as constructed in 1929 by the owner, and as contemplated when the lease was made, store No. 2 occupied the north 30 feet of the building with a 30 foot frontage on Broxton, the patio extended into the south line of the store some distance, and show windows and entrances were on the south side of store on the patio and passageway from Broxton. There was also an entrance and show windows on Broxton.

Plaintiffs, in their complaint, contend they have the right, and intend to close the passageways, except for a small portion extending from Broxton, and all of the patio, or at least a part thereof, and utilize them for other purposes.

The court found: "That the defendant * * * is, * * * the lessee, * * * of Store No. 2 and of three rooms on the second floor, as well as certain space on the mezzanine floor and in the basement, as more particularly described in said lease, * * * that Store No. 2 was occupied by subtenants of the defendant * * * in the operation of a men's clothing and furnishing store; and that the remainder of the said leased premises was occupied by the defendant * * * for use as a tailor shop, work rooms and sales rooms. That the said lease was for an original term of ten years with two additional ten-year terms at the option of the defendant * * * that the first option was exercised and the said defendant intends to exercise the second option so as to extend the lease term to November 1, 1959. * * *

"That the patio is obviously designed, constructed and decorated as a permanent and integral feature of the building. That the closing of the Kinross entry and expansion of Store No. 1 would interfere with and deprive the defendant Jack Hamner and his subtenants of light, air, and the public's view of the seven (7) display windows, and interrupt egress and ingress through the two doorways, all of which windows and doorways open on the said patio. That the continued use of the patio as it now exists for purposes of light, air, access and public view of the display windows, is of substantial and material value to the leasehold interest of the defendant Jack Hamner. * * *

"That the patio is and has been in constant use by the general public, and is used as a shortcut between Broxton and Kinross Avenues. That the use thereby causes many people to pass by the seven display windows in said patio, all of which is of material financial benefit to the business being conducted in defendant's leasehold premises, and of substantial value to the leasehold.

"The Court finds that the continued existence of the building as it now exists, including the uninterrupted use of both the Kinross and Broxton entrances, is necessary to the full and beneficial use of the portion of the premises leased to the defendant Jack Hamner, and that the use of the windows and display purposes, and for light and air, is of substantial benefit to the said defendant.

"The Court further finds that if the Kinross entry to the patio was closed and the patio area reduced in accordance with the plan outlined in green lines, as shown in Exhibit 1 attached to the Complaint and as set forth in plaintiffs' second cause of action, the defendant * * * would still suffer material and substantial loss in the business conducted in his leasehold premises, as such construction would obstruct all view of the display windows from Kinross Avenue, thus losing their value entirely, inasmuch as said windows are not clearly visible from Broxton Avenue; that such construction would destroy the shortcut feature of the patio and thereby discourage and prevent the public's use of the patio, and thereby destroy the display value of the windows; that the proposed change would destroy the beauty and the character of the building and create a narrow 'hole' accessible only from Broxton entrance; that the general public would have no inducement to enter such narrow cul-de-sac, and that the light and air to his patio windows would be greatly diminished; all of which would be to the substantial detriment of the Defendant Hamner, and materially depreciate the value of his leasehold.

"The Court further finds that when the lease to the said premises was entered into * * * that it was the manifest intention and the ageement of the parties thereto that the defendant * * * should have the occupancy of the interior areas described in his lease, and should also have the use of the patio as a source of light and air to his windows and doors opening thereon; for display of merchandise in the said windows; for room for customers and the general public to have convenient access to such windows; and for the free flow of pedestrian traffic through the patio by means of both the Broxton and Kinross entries. The Court finds that all of these things are reasonably necessary for the full and beneficial use of the interior store areas described in the lease to the defendant Jack Hamner. These facts were apparent to and were known by the plaintiffs when they acquired title to the property."

Thus the easements claimed by defendant to exist in the patio (floor area and upward to the sky) and the ways to both Kinross and Broxton were based in part at least on the doctrine of implied easements; no mention is made of such easements on the face of the lease. Plaintiffs contend, that in this state, there are no implied easements arising from a lease and running to the benefit of the lessee, relying upon § 820 of the Civil Code, reading: "A tenant for years or at will has no other rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired, or by the last section."

[1, 2] Without mentioning that code section, it has been repeatedly held (and the rule is practically universal), as expressed by this court in Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 10, 47 P.2d 462, 467: "A lease of a part of a building passes with it, as an incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised. * * * The general rule is that where a store is leased, everything then in use for the store, as an incident or appurtenance passes by the lease. Hall v. Irvin, 78 App.Div. 107, 79 N.Y.S. 614; Browning & Hull v. Dalesme, 3 Sandf. [5 N.Y.Super.] 13. * * *

[3] "The above principles are well settled. Supported by many authorities, the principles are stated as follows in 36 Cor. Jur. 29, § 630: 'A lease of a particular part of a building gives the lessee no rights outside of such part, except such as were intended to be included as appurtenant to the beneficial enjoyment thereof, or such as it was manifest had been designed and appropriated for the benefit of the leased premises.'

[4, 5] "In 36 Cor.Jur. 30, § 632, it is stated: 'As a general rule everything which belongs to the demised premises or is used with, and appurtenant to, them, and which is reasonably essential to their enjoyment passes as an incident to them, unless specially reserved. This rule, for example, applies to a lease of a part of a building.'" We believe the foregoing correctly states the rule applicable here. See Runyon v. City of Los Angeles, 40 Cal.App. 383, 180 P. 837; Harrison v. Ziegler, 51 Cal.App. 429, 196 P. 914; Hamelin v. Foulkes, 105 Cal.App. 458, 287 P. 526; Owsley v. Whelan Drug Co., 83 Cal.App.2d 454, 189 P.2d 50; Ng v. Warren, 79 Cal.App.2d 54, 179 P.2d 41; Mayer v. Hazzard, 10 Cal.App.2d 1, 51 P.2d 189; Guttman v Berry, 83 Cal. App.2d 507, 189 P.2d 41; Rees v. Drinning, 64 Cal.App.2d 273, 148 P.2d 378; Thompson on Real Prop. (Perm. ed.) § 1165 et seq.; 51 A.L.R. 1298; 51 C.J.S., Landlord and Tenant, § 293 et seq.; 32 Am.Jur., Landlord and Tenant, § 169 et seq. Section 820 is not inconsistent with the rule above stated, as it speaks of rights other than those given by the agreement (lease). Hence, as appears from the foregoing authorities, rights such as the easements here involved, constitute an implied part of the lease. The same reasoning distinguishes the language in Harrelson v. Miller & Lux, Inc., 182 Cal. 408, 412, 188 P. 800. The section should be read in the light of other provisions that: "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another." Civ. Code, § 662. "The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself." Civ. Code, § 1084. "The incident follows the principal, and not the principal the incident." Civ. Code, § 3540. "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." Civ. Code, § 1104.

None of the cases cited by plaintiffs, which have mentioned § 820 of the Civil Code, involve the question of implied easements. The cases cited supra are not distinguishable on the ground that some of them involved the question of liability for injury to a third person by reason of a defect in the premises. Plaintiffs advance no valid reason why rights should be measured by different tests in such cases than in those involving landlord and tenant.

[6] In the instant case the ways were designed by the lessor owner who constructed the building and were so indicated on the plans at the time the lease was made. They were constructed in that manner with defendant's-lessee's display windows and entrances facing thereon. Those factors point to their being appurtenant to or part of store No. 2. They were obvious and permanent in nature. They existed at least to the point of being contemplated and designed and laid out when the lease was made. "The purpose of the doctrine of implied easements is to give effect to the actual intent of the parties as shown by all the facts and circumstances. Although the prior use made of the property is one of the circumstances to be considered, easements of access have been implied in this state in situations in which there was no prior use. For example, where land was conveyed by reference to a map or plat showing proposed streets, it has been held that the grantee had an implied easement therein for use as a private way." Fristoe v. Drapeau, 35 Cal.2d 5, 8, 215 P.2d 729, 732.

[7] Plaintiffs contend that the evidence does not establish that the ways and patio are necessary to make the leased premises tenantable or for the enjoyment of the premises, and, therefore, they do not constitute easements appurtenant by implication. The law is not, however, that for such easements to be implied, they must be absolutely necessary or such as to make the leased property tenantable. The prevailing test, as stated in Bellon v. Silver Gate Theatres, Inc., quoted from supra, is whether they are "reasonably necessary for the beneficial enjoyment of the property leased." See Fristoe v. Drapeau, supra, 35 Cal.2d 5, 215 P.2d 729; Runyon v. City of Los Angeles, supra, 40 Cal.App. 383, 180 P. 837; Hamelin v. Foulkes, supra, 105 Cal.App. 458, 287 P. 526; Owsley v. Whelan Drug Co., supra, 83 Cal.App.2d 454, 189 P.2d 50; Ng v. Warren, supra, 79 Cal. App.2d 54, 179 P.2d 41; Harrison v. Ziegler, supra, 51 Cal.App. 429, 196 P. 914; Mayer v. Hazzard, supra, 10 Cal.App.2d 1, 51 P.2d 189; Thompson on Real Prop. (Perm.Ed.) §§ 1165 et seq.; 51 A.L.R. 1298; 51 C.J.S., Landlord and Tenant, § 293 et seq.; 32 Am.Jur., Landlord and Tenant, § 169 et seq. The same test has been held proper in implied easements arising from a conveyance, as distinguished from a lease, of property. Beem v. Reichman, 36 Cal.App. 258, 263, 171 P. 972; Cheda v. Bodkin, 173 Cal. 7, 158 P. 1025; Nay v. Bernard, 40 Cal.App. 364, 180 P. 827; Southern Pac. Co. v. Los Angeles Milling Co., 177 Cal. 395, 170 P. 829; Kallenburg v. Long, 39 Cal.App. 731, 179 P. 730; Fischer v. Hendler, 49 Cal.App.2d 319, 121 P.2d 792; Rees v. Drinning, 64 Cal. App.2d 273, 148 P.2d 378; Navarro v. Paulley, 66 Cal.App.2d 827, 153 P.2d 397; Rest. Property, §§ 474–6; 17 Am.Jur., Easements, § 30 et seq.; Tiffany, Real Property (3rd ed.) § 779 et seq. A case analogous to the one at bar is Gitlitz v. Plankinton Bldg. Properties, 228 Wis. 334, 280 N.W. 415, where the tenant had leased a store fronting on an arcade passageway and rotunda in a building extending from one street to another a half a block away. The owner closed one end of the arcade. Though no mention was made of the arcade or appurtenances in the lease, the court held that lessee had an easement therein by implication under the rule heretofore stated. See also Hat Box, Inc., v. Plankinton Bldg. Properties, 228 Wis. 342, 280 N.W. 419, involving the same building as in the Gitlitz case.

[8–12] Some cases have used the word necessary unmodified, see Cave v. Crafts, 53 Cal. 135; Rodemeyer v. Meger, 30 Cal. App. 514, 158 P. 1047; Grimmesey v. Kirtlan, 93 Cal.App. 658, 270 P. 243; Layne v. Bryant, 108 Cal.App. 324, 291 P. 615; A. Hamburger & Sons v. Lemboeck, 20 Cal.App.2d 565, 67 P.2d 380, but we do not understand them as requiring strict necessity. It must be remembered that the easements by implication here discusssed are not of the class known as easements of necessity. Cheda v. Bodkin, supra, 173

Cal. 7, 158 P. 1025; Nay v. Bernard, supra, 40 Cal.App. 364, 180 P. 827; Fischer v. Hendler, supra, 49 Cal.App.2d 319, 121 P.2d 792. Here the evidence is sufficient to support the trial court's finding that the passageways and patio are reasonably necessary for the beneficial enjoyment of store No. 2. Those easements with display windows and entrances thereon have existed practically the same as now, since the lease was executed in 1929. The trial judge viewed the premises, thus observing the physical arrangement. His observation is evidence in the case, Ng v. Warren, supra, 79 Cal.App.2d 54, 179 P.2d 41, and the physical circumstances speak for themselves. It is a fair inference that it would be advantageous for a store, which has entrances and display windows on a passageway from streets, that the latter are beneficial to the business, for business requires customers, and many customers are obtained from those passing by the store. The more streets accessible, the more prospective pedestrian purchasers available. It must be remembered that easements, such as we have here, do not fail to be necessary merely because there are other means of access, that is, they do not have to be the only means of access. Rees v. Drinning, supra, 64 Cal.App.2d 273, 148 P.2d 378; Mayer v. Hazzard, supra, 10 Cal.App.2d 1, 3, 51 P.2d 189. There is evidence in the record that the elimination of the easements would have a detrimental effect on the value of the leased property up to 40%; that the display windows on the easements had a definite value as a merchandising attraction, and specific large sales resulted from displays in the windows; that if there was not access to Kinross, the windows would would lose half their value; that they are used by the general public for "window shopping." Certainly a substantial reduction in the value of the leased property by the elimination of the ways and patio is a factor bearing upon reasonable necessity because the use of property and its value are directly related. If it has less value because of a restriction on its use, as would normally be the case, the reason therefore is because full use is necessary to full enjoyment—the postulate of maximum value. The foregoing factors are sufficient to support findings that the passageways and patio are reasonably necessary for the full enjoyment of the leased premises.

[13] Plaintiffs refer to testimony that one of defendant's sub-tenants did not use the windows for display purposes as the sun would damage his merchandise; that the light from this source was negligible; that the "pulling power" of the display windows is insignificant; and that the doors on the patio had been locked and not used. This evidence merely created a conflict upon a question which essentially was one for the trier of fact. Bellon v. Silver Gate Theatres, Inc., supra, 4 Cal.2d 1, 47 P.2d 462.

[14–16] It is argued that there is a clause in the lease which negatives any implied easement and gives to the plaintiffs the right to close the passageways and patio. It provides: "The lessor agrees to keep the building in good repair, including the roof, walls, sewer and main building plumbing, and to repair any defects in material and workmanship not caused through fault of said lessee. The lessor shall have the right at all reasonable times to enter into and upon the premises hereby leased for the purpose of inspecting the same and for the purpose of maintaining the building and making *repairs, alterations or additions* thereto without any rebate of rent to the lessee for any loss of occupancy or a quiet enjoyment of the premises thereby occasioned." (Emphasis added.) We do not so construe that clause. Its plain intent is merely to authorize the owner to enter the leased premises for the purpose of making "repairs, alterations or additions" to the *building*, he having the duty of keeping the *building* in good repair. By building is meant those parts of it which the lessor is obligated to maintain. It does not mean that he may make alterations of the building which will substantially or permanently destroy the leased premises or the easements which are a part thereof and appurtenant thereto. If that were not true, the lessor could make, with impunity, the leased premises completely useless in the face of the covenant of quiet enjoyment. A provision in a lease, like the one here involved, is to be given a reasonable construction to avoid impairment of the covenant of quiet enjoyment. See Succession of Marx v. Schornstein, La.App., 169 So. 93; Nabru Associates v. Zimmerman, 247 App.Div. 645, 288 N.Y.S. 315; Riechhold v. Sommarstrom Inv. Co., 83 Cal.App. 173, 256 P. 592; Hessler v. Schafer, 20 Misc. 645, 46 N.Y.S. 1076, affirmed 29 App.Div. 627, 52 N.Y.S. 1143.

[17] There are no implied easements for light and air, plaintiffs assert, and the court erred in finding that the patio must remain open to the sky, citing Kennedy v. Burnap, 120 Cal. 488, 52 P. 843, 40 L.R.A. 476 and Clark v. Mountain States Life Ins. Co., 1 Cal.App.2d 301, 36 P.2d 848, holding that no such easement over the grantor's property will be implied when he conveys his property which adjoins that over which the easement is claimed. There is a conflict of authority on the subject, see 23 Cal.L. Rev., 440; Gulick v. Hamilton, 293 Ill. 126, 127 N.E. 383, 9 A.L.R. 1634; Knight v. Mitchell, 154 Md. 102, 140 A. 74, 56 A.L.R. 1138, but the weight of authority is in accord with the Kennedy case. However, there is not as much divergence in regard to easements flowing from a lease of only a part of the property. See Clark v. Mountain States Life Ins. Co., supra, 1 Cal.App.2d 301, 36 P.2d 848; 51 A.L.R. 1302; 56 A.L.R. 1138. As we understand plaintiffs' complaint, however, they are not seeking to close the patio area where it extends through the second floor and roof of the building, so that problem is not presented. As we have seen, defendant has an easement which prevents plaintiffs' proposed alterations based upon factors other than light and air. Hence the portion of the judgment referring to light and air may be treated as surplusage.

[18] Plaintiffs claim that the judgment violates the statute of frauds, and is a fraud on them, because they purchased the building without knowledge of the easements. Plainly, the statute of frauds is not applicable here because the easements arise from the lease which was in writing. Tiffany, Real Property, § 780. Clearly the easements were open, obvious, apparent and permanent in nature when they purchased the property. Therefore, they cannot claim lack of notice.

[19] Finally, it is asserted that the court failed to find that all the area of the ways and patio is used with the premises. The findings heretofore quoted clearly cover the subject, at least by inference, and are sufficient to support the judgment.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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102 Cal.App.2d 220

In re NASH.

NASH et ux. v. REZNICK et ux.

Civ. 17994.

District Court of Appeal, Second District,
Division 3, California.

Feb. 9, 1951.

Proceeding in the matter of Larry Lee Nash, a minor. Philip L. Nash and Marjorie M. Nash filed a petition under Welfare and Institutions Code, § 701 to have the minor declared free from custody and control of his natural mother after she had refused to consent to adoption of the child by petitioners, which petition was opposed by Morris Reznick and Ethel Reznick. The Superior Court of Los Angeles County, George P. Bullock, J., entered an order granting respondents' motion for new trial after it had been found that the respondents, as parents of the minor, had abandoned him, and it had been concluded that minor should be declared free of their custody and control, and the petitioners appealed. The District Court of Appeal, Shinn, P. J., held that a statement in argument by petitioners' counsel of immaterial facts outside the record did not constitute a "surprise" entitling respondents to a new trial.

Order reversed.

1. Parent and child ⚷2(4)

In proceeding to have minor child decreed to be abandoned child free from parental custody and control, only issue involved was whether child was abandoned by his parent or parents as the case may be. Welfare and Institutions Code, § 701 (a).

2. Parent and child ⚷2(4)

In proceeding to have minor child decreed an abandoned child free from parental custody and control, whether there has been abandonment within meaning of statute is a question of fact for trial court. Welfare and Institutions Code, § 701(a).

3. New trial ⚷82, 95

The "surprise" for which courts have power to grant a new trial must be some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against. Code Civ.Proc. § 657.

See publication Words and Phrases, for other judicial constructions and definitions of "Surprise".

4. New trial ⚷98

In proceeding under statute to have minor child decreed an abandoned child free from parental custody and control, statement in argument by petitioners' counsel of immaterial facts outside of the record did not constitute "surprise", so as to entitle respondents to new trial upon such ground. Welfare and Institutions Code, § 701(a); Code Civ.Proc. § 657.

◆

R. Norman Wenzell, Hollywood, for appellants.

Gordon M. Emanuel, Beverly Hills, for respondents.

SHINN, Presiding Justice.

Appeal on the judgment roll by petitioners, Philip L. Nash and Marjorie M. Nash, from an order granting a new trial in a proceeding to have minor declared free from custody of parents.

Mr. and Mrs. Nash filed a petition in juvenile court under the provisions of section 701 of the Welfare and Institutions Code to have Larry Lee Nash, aged 3, declared free from the custody and control of his natural mother after she had refused to consent to the adoption of said child by petitioners.

Section 701 and subdivision (a) read as follows: "The jurisdiction of the juvenile court extends also to any person who should be declared free from the custody and control of either or both of his parents. The words 'person who should be declared free from the custody and control of either or both of his parents' shall include any person under the age of 21 years who comes within any of the following descriptions:

"(a) [Minor left in another's custody.] Who has been left by either or both of his parents in the care and custody of another without any provision for his support, or without communication from either or both of his parents, for the period of one year with the intent on the part of such parent or parents to abandon such person. Such failure to provide, or such failure to communicate for the period of one year, shall be presumptive evidence of the intent to abandon. Such person shall be deemed and called a person abandoned by the parent or parents abandoning him."

The child was born to respondent, Ethel Hendrickson, then an unmarried woman, on February 18, 1946. She entered the hospital under the name of Marjorie M. Nash and gave the name of the father of the child as Philip Nash and the child's birth certificate was made out accordingly. The child was then given into the care and custody of the petitioners, Mr. and Mrs. Nash and the natural parents, Ethel Hendrickson and Morris Reznick (who are now married) contributed nothing to his support. The trial court found that respondents, parents of said child, abandoned him, and concluded that he should be declared free from their custody and control.

Respondents moved for a new trial on the following grounds: "(1) Irregularity in the proceedings of the adverse party, by which citees were prevented from having a fair trial; (2) accident or surprise, which ordinary prudence could not have guarded against." The motion was granted for the latter reason.

The only affidavit filed in support of the motion for a new trial is that of respondents' attorney. Therein he states in part that counsel for petitioners, during his closing argument to the court, argued that Morris Reznick had refused and neglected to support his children by a former wife. It was asserted that to the best recollection of affiant no evidence of any kind had been brought out at the trial to which this argument could refer; that it was highly prejudicial to respondents; that affiant had receipts to prove that respondent Reznick had supported his other children and that affiant thought the argument of opposing counsel was made in good faith. This is, apparently, the "accident and surprise" which was the basis of the order granting the new trial inasmuch as it is the only point referred to in respondents' brief.

[1–3] In a proceeding such as this under section 701 (a) of the Welfare and Institutions Code, the only issue involved is whether the child was abandoned by his parent or parents, as the case may be. Guardianship of Kerns, 74 Cal.App.2d 862, 864, 169 P.2d 975. Whether there has been an abandonment within the meaning of the section is a question of fact for the trial court. In re Creely, 70 Cal.App.2d 186, 190, 160 P.2d 870; In re Sanders, 88 Cal.App.2d 251, 254, 198 P.2d 523. Respondents did not move for a new trial on the grounds of newly discovered evidence or that the evidence did not support the findings. (Code Civ.Proc. sec. 657.) We feel that it was an abuse of discretion to grant the motion on the ground specified. The surprise for which the courts have power to grant a new trial must be "some condition or situation in which a party to a cause is unexpectedly placed, to his injury, *without any default or negligence of his own* * * * which ordinary prudence could not have guarded against". Porter v. Anderson, 14 Cal.App. 716, 726, 113 P. 345, 350.

[4] A statement in argument of immaterial facts outside the record does not cause "surprise" in a legal sense and we cannot see how respondents could have suffered prejudice.

The order granting a new trial is reversed.

WOOD and VALLÉE, JJ., concur.

102 Cal.App.2d 183

PEOPLE v. THOMPSON.

Cr. 4545.

District Court of Appeal, Second District, Division 3, California.

Feb. 7, 1951.

Edward M. Thompson was convicted in the Superior Court, Los Angeles County, Charles W. Friche, J., for molesting minor children, and he appealed. The District Court of Appeal, Shinn, J., held that letter of superintendent to committing court which did not state whether defendant had or had not recovered from his sexual psychopathy or was a menace to society, was insufficient to comply with Welfare and Institutions Code.

Judgment reversed.

1. Criminal law ⚷625

Letter of state hospital superintendent to committing court which stated that sexual psychopathic defendant would not benefit by further care and treatment except in being isolated from society, but which failed to state whether defendant had or had not recovered from his sexual psychopathy or was a menace to society, was insufficient. Welfare and Institutions Code, §§ 5517, 5518.

2. Criminal law ⚷625

Statute which outlines procedure for return of person placed in state institution as sexual psychopath to committing court to await criminal charge should be strictly complied with. Welfare and Institutions Code, §§ 5517, 5518.

3. Criminal law ⚷625

Statutory provisions which outline procedure for return of a defendant, who has been committed to state hospital but who is still a sexual psychopath, and a menace to society, to committing court to await criminal charges, entitle such defendant to further hearing at which he may be represented by counsel, produce witnesses in his own behalf, and cross-examine witnesses produced against him. Welfare and Institutions Code, §§ 5517, 5518.

4. Criminal law ⚷625

Under statute which required report by superintendent of state hospital and director of mental hygiene containing a diagnosis and recommendation concerning sexual psychopath's future care, supervision and treatment when person placed in state institution as sexual psychopath was returned to committing court to await criminal charge, intent of legislature was for court to have such a report as evidence before final action would be taken. Welfare and Institutions Code, §§ 5517, 5518.

5. Criminal law ⚷625

Where letter of superintendent of state hospital to which accused had been committed as sexual psychopath was insufficient to comply with statutory requirements for reporting to committing court, accused did not waive his right to object to irregularities by failing to register specific objection and by applying for probation. Welfare and Institutions Code, §§ 5517, 5518.

6. Criminal law ⚷1043(1)

Where letter of superintendent of state hospital to which accused had been committed as sexual psychopath was insufficient to comply with statutory requirements for reporting to committing court, argument of defendant's counsel to court that defendant should be recommitted to state hospital was sufficient to enable him to present point on appeal. Welfare and Institutions Code, §§ 5517, 5518.

Al Matthews, Doris R. Baker, Harold J. Ackerman, and Robert P. Dockeray, all of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Gilbert Harelson, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant, Edward M. Thompson, appeals from judgment of conviction of violation of section 288, Penal Code.

Defendant was charged, in two counts, of violations of section 288 of the Penal Code, upon the persons of two sisters, female children aged seven years [twins]. He pleaded guilty to count I and count II was subsequently ordered off calendar. At approximately the same time the plea of guilty was entered, he filed his affidavit of sexual psychopathy under the provision of section 5501 of the Welfare and Institutions Code. He was thereafter adjudged a sexual psychopath and a menace to the health and safety of others and committed to the State Hospital at Patton for an indeterminate period. Defendant was returned to the trial court, pursuant to a minute order of March 27, 1950, and judgment and sentence to state prison were pronounced on June 15, 1950 when his application for probation was denied.

This appeal involves the construction of sections 5517 and 5518, Welfare and Institutions Code, which have apparently not been before an Appellate Court prior to this time. Section 5517, as amended in 1949, reads as follows: "Whenever a person who is committed for an indeterminate period to the department for placement in a state hospital as a sexual psychopath (a) has recovered from his sexual psychopathy to such an extent that in the opinion of the superintendent the person is no longer a menace to the health and safety of others, or (b) has been treated to such an extent that in the opinion of the superintendent the person will not benefit by further care and treatment in the hospital and is not a menace to the health and safety of others, or (c) has not recovered from his sexual psychopathy, and in the opinion of the superintendent the person is still a menace to the health and safety of others, the superintendent of the hospital and the Director of Mental Hygiene shall certify to the committing court their opinion under (a),

(b) or (c), as the case may be, including therein a report, diagnosis and recommendation concerning the person's future care, supervision or treatment. If the opinion so certified is under (a) or (b), the person shall be returned to the court to await the further action of the court with reference to the criminal charge against him.

"The court shall resume the proceedings, upon the return of the person to the court, and after considering all the evidence before it may place the person on probation for a period of not less than five years if the criminal charge permits such probation and the person is otherwise eligible for probation."

Section 5518, Welfare and Institutions Code, reads, in part, as follows: "If the opinion so certified is under subdivision (c) of Section 5517, the committing court shall forthwith order the return of the person to await further action with reference to the criminal charge against him, and shall cause the person to be returned to the court in which the case originated. Such court shall resume the proceedings and after considering all the evidence before it, if satisfied that the person has not recovered from his sexual psychopathy and is still a menace to the health and safety of others, the court shall make an order recommitting the person for an indeterminate period to the Department of Mental Hygiene for placement in a state institution or institutional unit for the care and treatment of such sexual psychopaths designated by the court. As such hearing, the person shall be entitled to present witnesses in his own behalf, to be represented by counsel and to cross-examine any witnesses who testify against him. * * *

"The court shall cause the person so recommitted to be delivered to the state institution or the institutional unit so designated. The person shall remain therein or in any other such institution or institutional unit to which he may be transferred by the Director of Mental Hygiene until the person is no longer a menace to the health and safety of others. Thereupon the proceedings set forth in Section 5517 shall be followed with respect to the certifying of an opinion to the committing court and the release of the person thereby."

On March 16, 1950, Dr. Gericke, Superintendent of Patton State Hospital, wrote to Judge Fricke as follows: "On December 21, 1949, Edward M. Thompson #3, case No. 49425, was admitted to Patton State Hospital as a sexual psychopath. He had been arrested for violation of Section 288 of the Penal Code for molesting minor children. We find that he is on parole from Walla Walla, Washington, and we have a letter from the Board of Prison Terms and Paroles in Seattle, signed by Lou Kessler, Chief State Parole Officer, informing us that they will accept subject if he is delivered to the King County Jail, Seattle, Washington. Inasmuch as this subject has not completed his sentence in Walla Walla and will not benefit by further care and treatment at Patton State Hospital except for the fact that he is isolated from Society, would there be any way in which we could make it possible to deport him to the State of Washington? Would you advise our returning him to the court with the information that he will not benefit by further care and treatment in order that the court might take further action in the case?"

On March 21, 1950, Judge Fricke wrote to Dr. Gericke, as follows: "Replying to your letter of the 16th regarding Edward M. Thompson, Section 5317 [sic] of the Sexual Psychopath Law provides that in a case such as this the defendant 'shall be returned to the court' and he should therefore be returned here for further proceedings."

On March 22, 1950, the following letter, signed by Dr. Gericke, Superintendent of Patton State Hospital and by Dr. F. F. Williams, Director of Clinical Services, was written to Judge Fricke: "We are in receipt of your letter concerning Edward M. Thompson #3, case number 49425, and it is our opinion this man will not benefit by further hospital treatment. He was sent here as a sexual psychopath, and we would appreciate it if arrangements would be made to have him returned to the custody of the court."

Defendant contends: (1) That the provisions of section 5517 and 5518 are mandatory and jurisdictional and that he was not properly returned to the trial court in that the exchange of letters previously set forth does not constitute the certificate provided for in section 5517; (2) that he should have been recommitted to a state institution as provided for in section 5518.

[1] If defendant was returned to the trial court under subdivision (a) or (b) of section 5517, it was proper for the trial court to pronounce judgment and sentence defendant to San Quentin. If, however, defendant was returned to the trial court under subdivision (c) of the section, then the procedure provided for in the statute has not been complied with.

Defendant is correct when he states that the letters do not contain a "report, diagnosis and recommendation concerning * * * [his] * * * future care, supervision or treatment." He is also correct when he states that neither of the letters was signed by the Director of Mental Hygiene as provided for in the statute.

It appears from the letters that defendant had been treated and would not benefit from further treatment. It does not appear whether he had, or had not recovered from his sexual psychopathy, and more important, it does not appear whether he is or is not still a menace to the health and safety of others. Section 5518 provides that anyone returned to the trial court under subdivision (c) of section 5517 (not recovered from sexual psychopathy and still a menace to society) shall be delivered to a state institution until the "person is no longer a menace to the health and safety of others." When that time occurs, then the proceedings provided for in section 5517 shall be followed. It would seem, therefore, that the prime consideration is whether or not the person adjudged a sexual psychopath is, or is not, a menace to society. The letter of March 16, 1950 written by Dr. Gericke to Judge Fricke contains the information that the defendant will not benefit by further treatment at Patton except for the fact that he is isolated from society. It appears to us that the logical inference which should be drawn from that statement is that the defendant was still a menace to the health and safety of others.

[2–6] We are of the opinion that the provisions of section 5517 should be strictly complied with. If a defendant who has been adjudged a sexual psychopath is recommitted in accordance with the provisions hereinbefore set forth, the trial court will have before it one of three findings: (a) The defendant has recovered and is no longer a menace to society; or (b) he will not benefit from further treatment and is no longer a menace; or (c) he is still a sexual psychopath, and a menace to society. If the prisoner falls into the third category, he is entitled to a further hearing at which he may be represented by counsel, produce witnesses in his own behalf and is entitled to cross-examine witnesses produced against him. If the procedure provided for is complied with, the trial court will also have before it a report made by the superintendent of the appropriate state hospital and the Director of Mental Hygiene containing a diagnosis and recommendation concerning the person's future care, supervision and treatment. It is clearly the intent of the legislature that the court is required to have such a report as evidence before final action is taken. It is contended by the People that defendant waived his right to object to irregularities in the proceedings by failing to register a specific objection and by applying for probation. We do not believe there was a waiver. Defendant's counsel argued to the court that defendant be recommitted to a state hospital, citing section 5518. We think this was sufficient to enable him to present the point on appeal.

The judgment is reversed for further proceedings in accordance with the views herein expressed.

WOOD and VALLÉE, JJ., concur.

ROSE v. KNAPP et al.*

Civ. 17944.

District Court of Appeal, Second District, Division 2, California.

Feb. 9, 1951.

Rehearing Denied Feb. 26, 1951.

Hearing Granted April 9, 1951.

Action by Maurice Rose, doing business as Golden State Finance Company, against E. W. Knapp, and others. The Superior Court, Los Angeles County, William J. Palmer and Charles E. Hass, JJ., entered an order dismissing the action, and the plaintiff appealed. The District Court of Appeal, McComb, J., held that trial court properly granted defendants' motion to dismiss in absence of showing by plaintiff of any facts to bring the action within any of the exceptions as stated in statute providing for timely prosecution of actions.

Affirmed.

1. Dismissal and nonsuit 🔑60(1)

Provisions of statute allowing dismissal of action if not brought to trial within five years after filing are mandatory unless there is a stipulation in writing by parties extending time within which cause may be tried, or there is a showing that defendant is absent from state, or action has not been brought to trial because of conduct or action of defendant, or it would have been impossible for plaintiff to proceed to trial. Code Civ.Proc. § 583.

2. Dismissal and nonsuit 🔑60(6)

Where complaint was filed in 1943, and in 1948 cause was taken off calendar in minute order containing clause which purported to waive statute providing for five-year limitation on prosecution of action, and in 1949 an order was made correcting clerical error in minute order by striking such clause, and no reason was shown why case could not have been tried within time, dismissal of action on defendants' motion in 1950 was proper. Code Civ.Proc. § 583.

3. Courts 🔑99(1)
Judgment 🔑552

An ex parte denial of a prerogative writ is not res judicata, is not law of case, and is not binding in subsequent trial of action, but such denial is simply a refusal by appellate court to exercise jurisdiction and does not constitute a determination of the merits of questions raised by application. Code Civ.Proc. § 583.

4. Motions 🔑58

Trial court did not abuse its discretion in amending an order to make it conform to facts on ground that insertion therein of purported waiver by both parties of five-year statute relating to timely prosecution of actions was merely clerical error. Code Civ.Proc. § 583.

5. Courts 🔑116(1)

Trial court may at any time upon request of either party or upon its own motion correct its records for clerical errors in order to make such records speak the truth.

A. J. Weiss, Hollywood, Samuel H. Sherman, Hollywood, of counsel, for appellant.

Bodkin, Breslin & Luddy, S. V. O. Prichard, Benjamin Chipkin and Oliver O. Clark, all of Los Angeles, for respondents.

McCOMB, Justice.

Plaintiff appeals from an order dismissing the action pursuant to the provisions of section 583 of the Code of Civil Procedure, for the reason that it was not brought to trial within five years after it was filed.

Chronology

i. The complaint was filed on July 16, 1943.

ii. June 16, 1948, the cause was taken off calendar and a minute order entered purporting to waive the five year statute under section 583 of the Code of Civil Procedure.

iii. November 16, 1949, an order was made correcting the minute order of June 16, 1948, by striking therefrom "both counsel by stipulation waive five years statute under Section 583 of the Code of Civil Procedure."

iv. February 2, 1950, defendants made a motion to dismiss the action pursuant to the provisions of section 583 of the Code of Civil Procedure which was denied.

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* Subsequent opinion 237 P.2d 981.

v. February 6, 1950, an application for a writ of prohibition filed by defendants with the District Court of Appeal was denied.

vi. February 10, 1950, defendants renewed their motion to dismiss the action pursuant to the provisions of section 583, Code of Civil Procedure. The motion was granted and the present appeal ensued.

Questions

First: *Did the trial court properly grant defendants' motion to dismiss the action?*

Yes. Section 583 of the Code of Civil Procedure reads in part as follows:

"Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended and except where it be shown that the defendant has been absent from the State or concealed therein and his whereabouts unknown to plaintiff and not discoverable to said plaintiff upon due diligence, in which event said period of absence or concealment shall not be a part of said five-year period. * * *"

[1] Provisions of this section are mandatory and must be followed unless (1) there is a stipulation in writing by the parties extending the time within which the cause may be tried, (2) there is a showing that defendant is absent from the state, (3) the action has not been brought to trial because of the conduct or action of defendant, or (4) although defendant has not been guilty of acts of obstruction it would have been impossible for plaintiff to proceed to trial. (Favretto v. Favretto, 86 Cal.App.2d 299, 301 et seq., 194 P.2d 748.)

[2] In the instant case there are no facts shown in the record bringing the action within any of the exceptions noted. No reason is shown why the case could not have been tried. In fact the record shows that there was another action between the same parties involving practically the same issues which was tried during the five-year period.

Since plaintiff has not shown any facts to bring the action within any of the exceptions to the rule stated in section 583, supra, the trial court properly dismissed the action.

[3] Second: *Did the denial of plaintiff's application for a writ of prohibition by the District Court of Appeal constitute the law of the case so that the trial court was bound thereby and should not have dismissed the action?*

No. An ex parte denial of a petition for a prerogative writ is not res judicata, is not the law of the case, and is not binding in a subsequent trial of the action. Such denial is simply a refusal by an appellate court to exercise jurisdiction and does not constitute a determination of the merits of the questions raised by the application. (Funeral Dir. Ass'n v. Bd. of Funeral Dirs., 22 Cal.2d 104, 107 et seq., 136 P.2d 785.) This rule is applicable in the instant case.

Third: *Did the trial court abuse its discretion in amending its order of June 16th by striking therefrom the purported waiver by both parties of the five year statute under section 583, Code of Civil Procedure?*

[4, 5] No. The trial court may at any time upon request of either party or upon its own motion correct its records for clerical errors in order to make such records speak the truth. (Carpenter v. Pacific Mutual Life Ins. Co., 14 Cal.2d 704, 707 et seq., 96 P.2d 796.)

In the present case the trial judge merely corrected the minute order to make it conform to the facts on the ground that the insertion therein of the matter stricken was merely a clerical error.

Affirmed.

MOORE, P. J., and WILSON, JJ., concur.

102 Cal.App.2d 174

In re PANATTONI.

PANATTONI et al. v. DANA.

No. 14646.

District Court of Appeal, First District,
Division 1, California.
Feb. 7, 1951.

Louise Stradi Dana filed a petition asking that Donald Dana Panattoni should be declared free from parental control. The petition was opposed by Donald Lawrence Panattoni and Lawrence Panattoni. The Superior Court of the State of California in and for the City and County of San Francisco, Milton D. Sapiro, J., entered an order declaring that Donald Dana Panattoni was free from the custody and control of his father, and Donald Lawrence Panattoni and Lawrence Panattoni appealed. The District Court of Appeals held that an order finding that child was in custody of maternal grandmother with whom father had placed child, that mother was dead and that father was in prison, and directing that citation should issue and be served on father to appear at the hearing of grandmother's petition to free child from parental custody constituted an "approval" by court of filing of petition within statute providing that such a petition shall not be filed without "approval" of probation officer except by juvenile court order.

Order affirmed.

1. Parent and child 🔑2(4)

The purpose of statute providing that petition to free child from parental custody shall not be filed without approval of probation officer except by order of juvenile court was to prevent indiscriminate filing of petitions to declare children free from their parents. Welfare and Institutions Code, § 721.

2. Parent and child 🔑2(4)

An order finding that child was in custody of maternal grandmother with whom father had placed child, that mother was dead and that father was in prison, and directing that citation should issue and be served on father to appear at hearing of grandmother's petition to free child from parental custody constituted an "approval" by court of filing of petition within statute providing that such a petition shall not be filed without "approval" of probation officer except by juvenile court order. Welfare and Institutions Code, §§ 721, 723, 726.

See publication Words and Phrases, for other judicial constructions and definitions of "Approval".

3. Parent and child 🔑2(4)

The denial of a motion for continuance of hearing on maternal grandmother's petition to free child from parental custody pending adoption proceedings by paternal grandparents was not abuse of discretion, as against contention that an order freeing child of custody would obviate necessity of consent of father to adoption and thereby grandparents would be placed in worse situation than maternal grandmother who also had adoption petition pending, since such order would actually place all parties desiring to adopt child on an even footing. Welfare and Institutions Code, § 721.

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Leo R. Friedman, San Francisco, for appellants.

Bronson, Bronson & McKinnon, San Francisco, for respondent.

BRAY, Justice.

From an order of the juvenile court declaring Donald Dana Panattoni free from the custody and control of his father, the father and the paternal grandfather appeal.

Questions Presented.

1. Was the order of the juvenile court setting time and place of hearing the petition and directing citation to issue a compliance with section 721 of the Welfare and Institutions Code?

2. Did the court abuse its discretion in denying a motion for continuance of the hearing?

Facts.

There is no controversy over the facts. Louise Stradi Dana, the maternal grandmother of Donald, the minor, filed a petition in the juvenile court asking that the minor be freed from the control of his father. It alleged that the father, Donald Lawrence Panattoni, was unfit to have the minor's custody for the reason that the father was now in San Quentin serving a sentence of from five years to life for the murder of his wife, the child's mother, whom he beat to death in a room adjoining that occupied by the child. Other charges of unfitness were also set forth. The petition further alleged that the child was now in the actual custody of petitioner. The same day that the petition was filed, an order of the juvenile court was signed and filed. This order is denominated "Order Setting Time and Place of Hearing of Petition and Directing that Citation Issue." It states: "It appearing that a petition has been filed by Louise Stradi Dana in the above entitled matter, alleging that said Donald Dana Panattoni is a person who should be declared free from the custody and control of Donald Lawrence Panattoni, his father, and praying that the above entitled Court make an order judicially depriving said above named father of the control and custody of said child." After giving the names of the mother and father of the minor and the fact that the mother is dead and the father in San Quentin, it stated that it appears that the child is now in the custody of petitioner "with whom said child was placed by" the father. It then ordered that the hearing of said petition be set for a certain time and place and that a citation should issue requiring the father to appear at the time and place stated, such citation to be served upon the father.

A written opposition to the petition was filed by the father and by Lawrence Panattoni, the paternal grandfather, and an affidavit by the latter. The answer denied most of the allegations of the petition other than the conviction of the father for the murder of his wife and his incarceration at San Quentin. Both the answer and the affidavit set forth that there was no necessity that the child be declared free of its father for the reason that petitioner had theretofore been appointed guardian of the person and estate of the minor, in a proceeding in which the objectors here had filed a counter petition seeking such appointment. The affidavit stated that the paternal grandfather and grandmother had filed certain proceedings for the adoption of said minor; that the father had given his consent to such adoption; that the adoption proceedings would be heard as soon as the State Department of Social Welfare had filed its report, and that if such adoption were permitted there would be no necessity for this proceeding. It stated that the sole purpose of this proceeding was to render nugatory the consent of the father to the adoption, and asked that the hearing be continued until after the determination of the adoption proceedings.

The court denied the motion for continuance, and after hearing evidence made its order declaring the minor free from the custody and control of its father.

1. Was there a substantial compliance with section 721 of the welfare and institutions code?

This section, after stating, in effect, that any person may present to the clerk of the superior court a petition asking that a child be declared free from the custody of its parent, states: "Prior to the filing of such petition the probation officer of such county shall make such investigation as he deems necessary, and no petition shall be filed without the approval of the probation officer except by order of the juvenile court."

Appellants contend that the court had no jurisdiction to hear the petition because, admittedly, the record fails to show: (1) a prior investigation by or approval of the probation officer, or (2) an order of the juvenile court which expressly ordered the filing of the petition. Respondent contends that the order setting the hearing and directing citation to issue satisfies the requirements of the section.

Appellants rely on In re People on Behalf of Bullock, 139 Cal.App. 664, 34 P.2d 769. There, the mother had been awarded, in a divorce action, the custody of the minor child, subject to her placing him in a certain military academy. She appealed from that portion of the decree directing that he be placed in the academy. While the appeal was pending, the father filed a petition in the juvenile court, claiming that the mother had failed to exercise proper parental care and asking that the child be made a ward of the court, free from her custody. The juvenile court granted the petition and the mother appealed. In discussing the question of jurisdiction of the juvenile court to make the order, the opinion states that it did not have such jurisdiction because it did not allege the matters required to give the court jurisdiction. It referred to the requirements of the Juvenile Court Law (the same as the present Welfare & Institutions Code § 721), and stated: "Furthermore, the report of the probation officer (or the order of court dispensing with it) is jurisdictional. The petition did not allege that such a report was made or excused by order of court. That this is not merely a technical objection is shown by the fact that the record discloses that neither the report nor the order was made and that the probation officer was not even called as a witness." 139 Cal.App. at pages 667-668, 34 P.2d at pages 770, 771.

An examination of the record in the Bullock case discloses a rather interesting situation. Neither in the lower court nor in the briefs is there any contention made that because there was neither probation officer approval nor court order, the court did not have jurisdiction. The only contentions discussed were lack of evidence to support the findings, the admissibility of certain evidence, and the insufficiency of the allegations of the petition. The record fails to show how the matter was brought on for hearing in the juvenile court. There is no order of any kind setting the petition for hearing. It is obvious, therefore, that the questions raised by the order in our case were not before the appellate court.

[1, 2] Undoubtedly the purpose of section 721 was to prevent the indiscriminate filing of petitions to declare children free from their parents. Unless the petition has the approval of the probation officer or of the court, it cannot be filed. The section, however, does not require the order of the juvenile court to be in any particular form. The order made here was, in form, more than the ordinary order setting a cause for hearing. It made findings. For example, it found that the child had been placed with the petitioner by the father. Section 723 provides that either the judge or the clerk may set the time for hearing. Thus, it was not necessary to have a court order on the subject. Again, it was not necessary to have the court order that citation issue. Section 726 provides that upon the filing of the petition a citation shall issue. Hence, it is apparent that this order was, in effect, an approval by the court of the filing of the petition. Technically, of course, the order did not order the filing of the petition, but, finding the matters which it did, certainly constitutes an approval of the petition and its filing. As said by the juvenile court judge: "It would appear to me that the order made by the Court is an order accepting jurisdiction, and reciting the grounds there. The order signed by Judge Devine sets out the facts which would make the situation subject—and I think there is implicit, in that order, the permission to proceed with the petition." To hold that the order failed of the purpose required by section 721 would be to place form above substance. It clearly approved the initiation of the proceeding. The Bullock decision does not conflict with this interpretation of the section and the order.

2. No abuse in denying continuance.

[3] Appellants' main claim of abuse in this respect is that by going on with the hearing and declaring the child free of the custody of its father the court obviated the necessity of the consent of the father to its adoption, thereby placing, say they, the paternal grandparents in a worse situation than the maternal grandmother, who also has a petition for adoption pending. This does not follow. Actually, it places all parties desiring to adopt the child on an even footing. In the adoption proceedings the court may still take into consideration the father's preference, if it desires, along with other evidence. The court is freed to act in the child's welfare. If, however, our proceeding had been postponed, and the child not freed from paternal control, a father who may be shockingly unfit as a parent would be able to dominate and direct the child's future regardless of its

best interests. There was no abuse of discretion in going on with the hearing.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

102 Cal.App.2d 314

PEOPLE v. DUNLOP et al.

Cr. 4595.

District Court of Appeal,
Second District,
Division 2, California.

Feb. 15, 1951.

Frank C. Dunlop and others were convicted of robbery. The Superior Court, County of Los Angeles, Joseph M. Maltby, J., rendered judgment denying their petitions for writ of error coram nobis or for writ of habeas corpus as an alternative remedy, and they appealed, and filed with the Clerk of the District Court of Appeal their petition for writ of certiorari. The District Court of Appeal, Moore, P. J., held that the writ of error coram nobis was properly denied where the alleged errors were known to the accuseds at the time they made their motion for new trial, and that the superior court of Los Angeles County did not have jurisdiction of the petition for writ of habeas corpus inasmuch as the accuseds, being prisoners of the state, were residents of Sacramento County, and that certiorari was not an available remedy where the right of appeal existed.

Judgment affirmed and petition for writ of certiorari denied.

1. Criminal law 🔑1163(1)

He who assigns prejudicial error of the trial court must affirmatively establish such error in order to gain any advantage therefrom.

2. Criminal law 🔑1128(2)

Statements in appellants' petition or in their brief will not be considered as proof of their contentions and only the record will be scrutinized.

3. Criminal law 🔑1202(1)

The habitual criminal statute was not designed to create a new type of crime or any crime. Pen.Code, § 644.

4. Criminal law 🔑1202(1)

Under habitual criminal statute, prior convictions are not elements of a separate offense or of the offense alleged in accusation charging a subsequent offense, but the prior convictions merely increase penalty on conviction of subsequent felony and deprive defendant of an early parole. Pen. Code, § 644.

5. Criminal law 🔑1201

The classification of defendant as an habitual criminal by reason of his prior convictions does no violence to any privilege guaranteed by either the state or the federal Constitution. Pen.Code, § 644.

6. Constitutional law 🔑203, 250
Criminal law 🔑1201

The habitual criminal statute is not an ex post facto law and does not deny equal protection of the law and does not place an accused with prior convictions in jeopardy by reason of such prior convictions. Pen.Code, § 644; U.S.C.A.Const. Amend. 14.

7. Criminal law 🔑1202(1)
Indictment and information 🔑114

To warrant a person's conviction as an habitual criminal under statute, the indictment, in addition to the accusatory clause, must allege that the defendant has been previously twice convicted upon charges separately brought and tried, and that he has served separate terms in a state or federal prison for any of the crimes listed, and such allegation and proof may be made even though the accused has been pardoned or has committed the second crime while on parole, and it is not essential that the defendant must have served the full term of his sentence under the prior conviction. Pen.Code, § 644.

8. Criminal law 🔑1202(1)

Where prior convictions were alleged and the defendants severally pleaded the truth of such allegations, that was sufficient to support the judgments of habitual criminality on the part of each of the defendants. Pen.Code, § 644.

9. Criminal law ⚷997

A writ of error coram nobis was properly denied where all the alleged errors of the court trying accuseds for their crime and all of the facts alleged in their petition were known to them at the time they made their motion for new trial as well as at the time of their appeal from the judgment of conviction or by exercise of reasonable diligence could have been discovered.

10. Criminal law ⚷997

An applicant for a writ of error coram nobis must show that he could not have discovered the facts he alleges at any time substantially earlier than the time of his motion for the writ.

11. Criminal law ⚷997

The purpose of writ of error coram nobis is to secure relief where no other remedy exists, and therefore convicted person must take advantage of every remedy provided by law to defeat his sentence.

12. Criminal law ⚷997

Where alleged insufficiency of evidence to support judgment that defendants were habitual criminals was known to defendants when they presented their new trial motions, and alleged denial of guaranties of Fourteenth Amendment could have been asserted on appeal, such matters were not reviewable by means of writ of error coram nobis. Pen.Code, § 644; U.S.C.A.Const. Amend. 14.

13. Criminal law ⚷997

Petition for writ of error coram nobis was properly denied where petition made no pretense of diligence or of excuse for petitioners' negligence in waiting for over three years to apply for such remedy.

14. Habeas corpus ⚷113(3)

Appeal from a decision of a superior court on habeas corpus is not authorized.

15. Habeas corpus ⚷48

Prisoners of the state who are residents of Sacramento county must present their petitions for writ of habeas corpus to Superior Court of Sacramento county. Const. art. 6, § 5.

16. Habeas corpus ⚷54

Petition for writ of habeas corpus by prisoner of state must name the officer holding the petitioners in confinement and must show that a copy of the application for the writ has been served upon the district attorney at Sacramento. Pen.Code, §§ 1474, 1475, 1477.

17. Habeas corpus ⚷46

The District Court of Appeal and not Superior Court had exclusive original jurisdiction of habeas corpus petition by petitioners whose appeal from judgment of conviction had been decided by District Court of Appeal. Pen.Code, § 1265.

18. Criminal law ⚷1071

A petition for a writ of certiorari not accompanied by points and authorities is not entitled to consideration by the District Court of Appeal. Rules on Appeal, rule 56.

19. Criminal law ⚷1011, 1012

Certiorari is not an available remedy where the right of appeal exists or where the inferior tribunal had jurisdiction to enter the judgment complained of which, in fact, was entered and affirmed on appeal.

◆

Fred N. Howser, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for the People.

Each defendant in propria persona.

MOORE, Presiding Justice.

Appellants were convicted of robbery in May, 1946. The remittitur from this court was filed in the court below in May, 1947. In September, 1950, acting in *propriis personis* they filed their petition for a writ of error coram nobis or for writ of habeas corpus as an alternative remedy on the ground that they had been deprived of their liberty without due process of law. The court below denied their petition for good reasons as will presently appear.

[1, 2] They argue that the proceedings had upon the information accusing them were void in that no order was made authorizing an amendment to the pleading. There is not the faintest proof that any

pleading other than the original information was filed. In truth, there is no showing of an error of any kind committed on the trial or of any concealment of a fact relevant to the issues under investigation or of the failure of the prosecutor or the court to protect such rights as appellants had under the constitutions and laws. He who assigns prejudicial error of the trial court must affirmatively establish such error in order to gain any advantage therefrom. People v. Russell, 156 Cal. 450, 458, 105 P. 416. Statements in appellants' petition or in their brief will not be considered as proof of their contentions. Only the record will be scrutinized. El Rio Oils (Canada) Ltd. v. Pacific Coast Asphalt Company, 95 Cal.App.2d 186, 190, 213 P.2d 1.

[3–5] Appellants declared in their application for the writ that no information was filed accusing them of being "habitual criminals," under section 644 of the Penal Code. That section was not designed to create a new type of crime or any crime. Ex parte McVickers, 29 Cal.2d 264, 271, 176 P.2d 40. The only offense of which they were accused was that alleged and for which they were tried. The punishment meted out to them was for the robbery of which they were convicted. The prior convictions had given them a new status by reason whereof, upon conviction for a subsequent felony, the penalty for the latter was increased. Ibid. While the establishment of their habitual criminality will deprive them of an early parole, it does not constitute a conviction for a separate offense. That prior convictions are not elements of a separate offense or of that alleged in the accusation is settled law. Ibid. They merely aggravate the position of one accused of the primary offense in that he is by reason of his former imprisonment placed in the classification of those who may never be reformed. Such classifying does no violence to any privilege guaranteed by either the state or the federal constitution. People v. Richardson, 74 Cal.App.2d 528, 542, 169 P.2d 44. Appellants knew from the allegations of prior felonies that the terms of their imprisonment on conviction would be longer.

[6] Section 644, supra, does not place an accused person with prior convictions in jeopardy by reason of such former conviction; neither is it an *ex post facto* law. People v. Rosencrantz, 95 Cal.App. 92, 95, 272 P. 786; In re Rogers, 20 Cal.App.2d 397, 402, 66 P.2d 1237; Ex parte McVickers, supra. And it does not deny equal protection of the law vouchsafed by the Fourteenth Amendment. People v. Floth, 8 Cal.App.2d 600, 602, 47 P.2d 817; People v. Israel, 91 Cal.App.2d 773, 785, 206 P.2d 62; People v. Maddox, 75 Cal.App.2d 478, 479, 171 P.2d 561.

[7, 8] Appellants contend that their prior convictions were prejudicially alleged against them because they had not been legally discharged after such prior convictions and "are still under sentence thereunder." Section 644 makes no requirement that one accused of a felony must either be in prison or have completed his term to constitute a "prior conviction." To warrant a person's conviction as an habitual criminal under the statute besides the accusatory clause the indictment must allege that he has been previously twice convicted upon charges separately brought and tried, that he has served separate terms in a state or federal prison for any of the crimes listed. Such allegation and proof may be made even though the accused has been pardoned, People v. Biggs, 9 Cal.2d 508, 510, 71 P.2d 214, 116 A.L.R. 205, or has committed the second crime while on parole, In re Brady, 5 Cal.2d 224, 225, 53 P.2d 945, and it is not essential that the defendant must have served the full term of his sentence under the prior conviction. People v. Carkeek, 35 Cal.App.2d 499, 501, 96 P.2d 132; Spivey v. McGilvray, 29 Cal.App.2d 357, 360, 84 P.2d 256; People v. Martin, 78 Cal.App.2d 340, 342, 177 P.2d 813. Not only were the prior convictions alleged but appellants severally pleaded the truth of such allegations and that was sufficient to support the judgments of habitual criminality on the part of each of them.

[9–13] The writ of error coram nobis was properly denied appellants for the reason that all the alleged errors of the court which tried them for their crime and all other facts alleged in their petition were known to them at the time they made their motion for a new trial as well as at the time of their appeal, People v. Dunlop, 79 Cal.App.2d 207, 179 P.2d 658, or could by the exercise of reasonable diligence have been discovered. For an applicant to be entitled to such writ he must show at least that he could not have discovered the facts he alleged at any time substantially earlier than the time of his motion for the writ. People v. Adamson, 34 Cal.2d 320, 326, 210 P.2d 13. Since its purpose is to secure relief where no other remedy exists it is incumbent upon a convicted person to take advantage of every remedy provided by law to defeat the hated sentence. If the judgments that appellants were habitual criminals were not supported by evidence that fact was known when they presented their motions for new trials. Also, if they were denied the guaranties of the Fourteenth Amendment to the federal constitution they might at least have mentioned such fact on their appeal. Such points having been ignored when they might have been made the theme for an appropriate argument on appeal cannot be reviewable by means of a writ of error coram nobis. People v. James, 99 Cal.App.2d 476, 222 P.2d 117; People v. Ellis, 99 Cal. App.2d 188, 221 P.2d 258; People v. Baker, 92 Cal.App.2d 623, 625, 207 P.2d 58. Moreover, appellants' petition makes no pretense of diligence or of excuse for their negligence in waiting for over three years to become infected with the virus of a zeal to escape the penalties for their sins by a remedy of limited scope. In the absence of such showing the court below was obliged to deny their petition for that writ. People v. Emery, 99 Cal.App.2d 173, 221 P.2d 223.

[14–16] Their petition for a writ of habeas corpus is equally as hopeless. Appeal from a decision of a superior court on habeas corpus has not been authorized. Loustalot v. Superior Court, 30 Cal.2d 905, 913, 186 P.2d 673; Matter of Zany, 164 Cal. 724, 728, 130 P. 710. Also, appellants are residents of Sacramento county to whose superior court they as prisoners of the state must present their petitions for such writ. Constitution, Art. VI, sec. 5; Matter of Hughes, 159 Cal. 360, 364, 113 P. 684; Zeigler v. Superior Court, 134 Cal. App. 88, 89, 24 P.2d 899. Not only was the court below without jurisdiction but the petition names no officer as holding them in confinement, legally or otherwise, and no showing is made that a copy of the application for the writ was served upon the district attorney at Sacramento. Penal Code, secs. 1474, 1475, 1477.

[17] Wanting in all the essentials of a valid petition for either of the writs requested, the denial thereof was correct. Furthermore, the superior court had no jurisdiction to entertain appellants' petition since their appeal had been decided by this court which, consequently, had exclusive original jurisdiction of the petition. Penal Code, sec. 1265; amended Stats. 1949, ch. 1309, sec. 2.

About one week prior to the hearing of the cause presented by petitioners for a writ of error coram nobis or for a writ of habeas corpus petitioners filed with the clerk of this court their petition for a writ of certiorari to be directed to the Superior Court of Los Angeles county commanding such court to certify to this court "the complete records, all in its entirety" and all proceedings of the case including notes, minutes, arguments by the district attorney for a review and determination by this court on the following grounds: (1) The proceedings are invalid under the Fourteenth Amendment to the federal constitution in that the district attorney committed misconduct in filing an *ex parte* amended information and that petitioners were twice put in jeopardy for the same offense; (2) the superior court had no jurisdiction to pass upon the petition for writ of error coram nobis or for writ of habeas corpus as an alternative remedy; (3) the superior court misinterpreted the Fourteenth Amendment to the federal constitution; (4) in the interest of uniformity of decision between this court, the Supreme Court and the United States Supreme Court; (5) the superior court has not decided the federal questions of substance not theretofore determined or has decided it in a way not in accord with applicable decisions of such courts; (6) by allowing the amended information the trial court "did abridge the privileges and immunities of the law clauses of your petitioners, as is guaranteed by the Fourteenth Amendment * * * and has 'disregarded' the authority of the state Supreme Court decision, People v. Parker, 91 Cal. 91, 27 P. 537, and denied the authority of the United States Supreme Court, Hurtado v. California, 110 U.S. 516, 4 S. Ct. 111, 292, 28 L.Ed. 232"; (7) there is a conflict in decisions of the appellate courts and the state Supreme Court which the superior court has disregarded to the disadvantage of petitioners.

[18, 19] Such petition is not accompanied by points and authorities as provided by rule 56 of Rules on Appeal and is therefore not entitled to consideration by this court. Moreover, certiorari is not an available remedy where the right of appeal exists or where the inferior tribunal had jurisdiction to enter the judgment complained of which, in fact, was entered and affirmed on appeal.

The judgment is affirmed. The petition for writ of certiorari is denied.

McCOMB and WILSON, JJ., concur.

KENNEY et al. v. WOLFF et al.

Civ. 14441.

District Court of Appeal, First District,
Division 1, California.
Feb. 5, 1951.

W. D. Kenney and others brought action against Harry K. Wolff, and others, etc., for a writ of mandate, injunction and declaratory relief involving certain of the seniority rights of over 175 specified employees of the City and County of San Francisco, who were formerly employees of the Market Street Railway Company, and who were "blanketed-in" to employment with the city by virtue of city charter when private company was acquired by the city on September 29, 1944. A judgment for plaintiffs was entered in the Superior Court of the State of California, in and for the City and County of San Francisco, Thomas M. Foley, J., and the defendants appealed. The District Court of Appeal, Peters, P. J., held that under city charter, former employees of street railroad company, who were blanketed-in to employment with city when private company was acquired by city were to be given credit in matters involving length of service, for their employment in private company prior to date when private company was acquired by city.

Judgment affirmed.

1. Municipal corporations 🔑213

If former employees of street railroad company who were "blanketed-in" to employment with city by virtue of city charter when company was acquired by city had a right to be deemed appointed to city service as of date they joined the private company, city civil service commission had no power to take that right away by rule.

2. Administrative law and procedure 🔑385, 390

Municipal corporations 🔑167

The rule making power vested by a city charter in a municipal agency must be exercised in conformity with charter provisions, and any rule adopted by such agency which has effect of opening the way to circumvent or nullify charter provisions is, to that extent, void.

3. Constitutional law 🔑186

A retrospective law is not necessarily invalid under either federal or state constitution.

4. Constitutional law 🔑113, 188

In California, a statute is not invalid merely because it is intended to operate retrospectively, but it may be invalid if it deprives one of vested rights which are bound to be respected or protected by state, or if it impairs obligations of a contract.

5. Statutes 🔑181(1)

General rules of statutory construction are at best but a very general guide to be used in attempting to ascertain legislative intent.

6. Municipal corporations ⚷213

The word "continued", as used in provisions of charter of City and County of San Francisco that all persons employed in operating service in any public utility hereafter acquired by city and county at time it is taken over by city and county, and who have been so employed for at least one year prior to date of such acquisition, shall be continued in their respective positions and shall be deemed appointed to such positions, under, and entitled to all benefits of the civil service provisions of charter, would be construed as meaning that former employees of private company were to be given credit, in matters involving length of service, for employment in the private company prior to date private company was acquired by city.

See publication Words and Phrases, for other judicial constructions and definitions of "Continued".

7. Statutes ⚷184

Although the result that will follow from a particular construction of a statute is a factor to be considered in interpreting the statute, a fancied result that involves different factors and principles should not be given much weight.

◆

Dion R. Holm, City Atty., Bernard J. Ward, Jr., Deputy City Atty., San Francisco, for appellants.

Charles Becker, San Francisco, for respondents.

PETERS, Presiding Justice.

This action for a "writ of mandate, injunction and declaratory relief" involves certain of the seniority rights of over 175 specified employees of the City and County of San Francisco who were formerly employees of the Market Street Railway Company, and who were "blanketed-in" to employment with the city by virtue of section 125 of the city charter when the private company was acquired by the city on September 29, 1944. The action has had a somewhat involved history. The original complaint, containing five causes of action, was filed March 6, 1946, and, after answer filed, the action came on for trial in June of 1946. During the trial the attention of the court was called to the case of Mullins v. Henderson, 75 Cal.App.2d 117, 170 P.2d 118, then on appeal to this court. It was believed by all involved that the Mullins case involved certain of the issues then before the trial court in the instant case. By stipulation, these points were withdrawn from consideration pending the decision in the Mullins case, and the trial continued to judgment on the remainder of the issues not within the stipulation. The judgment on those retained issues was in favor of the plaintiffs and was affirmed on appeal by Division Two of this court in Kenney v. Wolff, 84 Cal.App.2d 592, 191 P.2d 88.

On February 17, 1947, the hearing of the reserved issues was resumed before the same judge that had heard the first part of this action. These reserved issues are those set forth in the complaint as the fourth cause of action, and subparagraph 4 of the fifth cause of action. These portions of the pleadings allege, substantially, that the defendants, unless restrained, will, in violation of section 125 of the charter, subordinate the plaintiffs to persons who were in the employment of the city prior to the acquisition of the Market Street Railway in all matters relating to discharges, layoffs, seniority, re-employment, promotional examinations and assignment of positions. These points were not discussed in the majority opinion in the Mullins case as had been anticipated, but were discussed in the concurring opinion in that case.

After a trial of the instant case, the court ordered judgment for plaintiffs and made and entered its findings. On motion for a new trial the parties stipulated that the motion should be denied upon the revision of certain of the findings. The court thereupon made supplemental findings in lieu of the original ones pursuant to the stipulation, and entered its judgment in favor of plaintiffs. This judgment provides:

1. That the defendants are prohibited by section 125 of the charter from subordinating plaintiffs to persons who were in the employment of the city prior to September 29, 1944, in matters relating to

discharges, layoffs, re-employment, promotional examinations, credit for length of service, and assignments of positions, if length of service is a factor in such assignment.

2. In connection with such matters the plaintiffs are entitled to seniority rights from the dates of their original employment with the Market Street Railway Company. The precise date that each plaintiff was hired by the Market Street Railway Company is set forth in the judgment.

3. A peremptory writ of mandate was ordered to compel defendants to give plaintiffs credit in such matters.

Defendants appeal from the judgment.

On this appeal the sole question presented is the proper interpretation of that portion of section 125 of the charter which provides: "* * * All persons employed in the operating service of any public utility hereafter acquired by the city and county at the time the same is taken over by the city and county, and who shall have been so employed for at least one year prior to the date of such acquisition, shall be continued in their respective positions and shall be deemed appointed to such positions, under, and entitled to all the benefits of, the civil service provisions of this charter; provided, however, that no person who is not a citizen of the United States shall be so continued in or appointed to his position * * *."

Defendants take the position that the meaning of this section is that the former Market Street Railway employees are deemed to have entered the service of the city for seniority purposes, on September 29, 1944, the date of the consolidation, and are to get no credit for service prior to such date.

Plaintiffs take the position that this section means that said former Market Street Railway employees are to be given credit, in matters involving length of service, for their employment in the private company prior to September 29, 1944. The trial court concurred with this view.

The facts need not be recounted at length. It is sufficient to state that all of the plaintiffs are American citizens, and were employed by the Market Street Railway Company for more than one year prior to its acquisition by the city on September 29, 1944, and, as such, pursuant to section 125 of the charter above quoted, were "blanketed-in" to employment with the city. The evidence shows, and the city admits, that as to those matters involving seniority rights and credit for prior service the city has treated and will continue to treat, unless restrained, these plaintiffs as having served only from September 29, 1944, the date of the consolidation. No credit for service with the Market Street Railway Company is allowed. This applies to matters relating to discharges, layoffs, re-employment, credits on promotional examinations, credits for length of service and credits in connection with assignment of positions where length of service is a factor in such assignments. As to other employees of the city, credits are allowed from the date of their employment with the city.

[1, 2] This is by no means the first time that this charter provision has been before the courts for interpretation. The first case was Handlon v. Wolff, 72 Cal. App.2d 53, 164 P.2d 46. In that case it appeared that Handlon had been the chief claims agent for the Market Street Railway Company for some 30 years prior to the consolidation. He was "blanketed-in" to the city service by virtue of section 125. The precise question presented was what position he should be given in the city system. This court held that a proper construction of section 125 required that Handlon be given the same position, or one similar to it, in the city service that he had occupied with the private company. We further held that the civil service commission had violated section 125 of the charter by assigning Handlon to the position of ordinary claims adjuster. This case did not involve, and therefore did not decide, the question as to when these "blanketed-in" employees are to be deemed appointed for purposes of seniority, which is the point now involved, but it does contain some language that is pertinent on that point. In the present case the defend-

ants place some reliance on certain rules of the commission specifying September 29, 1944, as the date the "blanketed-in" employees shall be deemed appointed for certain purposes of seniority, and the defendants point out that the rules of the commission, properly adopted, have the same force and effect as a charter provision. Mitchell v. McKevitt, 128 Cal. App. 458, 461, 17 P.2d 789. In reference to a similiar argument made in the Handlon case the court stated 72 Cal.App.2d at page 59, 164 P.2d at page 49: "If Handlon had a right to the position of claims agent it was beyond the power of the commission to take that right away." In the present case, if the plaintiffs had a right to be deemed appointed to the city service as of the date they joined the private company, the commission had no power to take that right away by rule. "* * * it is a fundamental principle of municipal law that the rule-making power vested by a city charter in a municipal agency must be exercised in conformity with all charter provisions, and that any rule adopted by such agency which has the effect of opening the way to circumvent or nullify charter provisions is, to that extent, inoperative and void." Ballf v. Civil Service Commission, 43 Cal.App.2d 211, 215, 110 P.2d 478, 480; see, also, Kenney v. Wolff, 84 Cal.App.2d 592, 191 P.2d 88.

Also in the Handlon case, this court, in discussing the effect that the commission's interpretation of section 125 of the charter would have on Handlon when and if he took a promotional examination, stated 72 Cal.App.2d at page 58, 164 P.2d at page 48: "* * * under the terms of the examination 100 points out of a total obtainable 1,000 would be lost to Handlon because he had not been previously an employee of the city and county." In our case, if we adopt the interpretation of the defendants, the plaintiffs will lose 50 points in all examinations where service prior to September 29, 1944, is involved. Thus, the Handlon case, while it does not compel, it does suggest the construction given to section 125 by the trial court in the instant case.

Another case where section 125 has been interpreted is Mullins v. Henderson, 75 Cal.App.2d 117, 170 P.2d 118, also written by this court. In that case there was involved the validity of certain proclamations made by the mayor of San Francisco under the emerency powers of section 25 of the charter. By those proclamations the mayor, during the war emergency and because of the threat of the Market Street employees to quit if they were paid only beginner's pay upon the consolidation, gave to the ex-employees of the Market Street Railway Company who were "blanketed-in" to the city service under section 125 of the charter, certain seniority rights in determining runs and compensation, "that is to say, that service with the Market Street company should be deemed service with the city in determining runs and compensation under the compensation fixed for like service with the city." 75 Cal.App.2d at page 121, 170 P.2d at page 122.

The majority of the court upheld the proclamations as a proper exercise of the mayor's emergency powers. I wrote a concurring opinion in which it was held that it was not necessary to pass on the validity of the mayor's proclamations because the provisions of the proclamations were already compelled by a proper interpretation of section 125. In this connection the concurring opinion states, 75 Cal.App. 2d at page 136, 170 P.2d at page 131: "There can be no doubt at all that under this section [125] the Market Street operating personnel had a charter right to be blanketed into civil service. But the charter does not merely give these employees the right to be employed as beginners. It provides that they shall be 'continued in their respective positions' and 'shall be deemed appointed to such positions' and entitled to 'all the benefits' of civil service. That language clearly and without ambiguity provides that the positions these employees had with Market Street shall be continued, and that in such positions such employees shall be entitled to the civil service rights attaching to those positions. The charter itself gives the employees this right without the necessity of further action by the mayor, the board of supervisors, or the civil service commission. The charter guarantee is to a position substantially similar in kind and degree to the one held by them under Market Street. The language quoted is capable of no other reasonable construction."

After quoting from and discussing Handlon v. Wolff, supra, the concurring opinion continues 75 Cal.App.2d at page 137, 170 P.2d at page 132: "It seems too clear to require extended argument that an employee with important seniority rights attaching to his position with Market Street is not 'continued' in his 'respective' position, nor in the words of the Handlon case, has he been appointed to 'a similar position in kind and degree—one that in salary, authority, duties, etc. is reasonably comparable to the employee's former position,' if after working for Market Street for many years he is offered a beginner's job with no seniority benefits with the city, and at beginner's pay. Such a holding would mean that the Market Street employee would not be given substantially the same position with the city that he had with Market Street, but would be offered a position substantially, materially and realistically lower in rank."

While this language is contained in a concurring opinion, and therefore does not constitute a binding precedent, if it contains a correct interpretation of section 125, it fully supports the interpretation given the section by the trial court in the instant case. My associates who were on the court when the Mullins case was decided did not disagree with the interpretation contained in the concurring opinion, they simply believed that is was not necessary to base the opinion on section 125 in view of the emergency powers conferred upon the mayor by section 25 of the charter. My present associates agree with the interpretation given section 125 in the concurring opinion of the Mullins case. That is practically decisive of the issues raised on this appeal.

[3, 4] Defendants, in opposition to this construction, contend that to so construe the section is to give it retroactive effect in that such construction gives to the old Market Street employees rights, privileges, and credits based upon their service with Market Street that they never enjoyed prior to the date of the consolidation. This contention is based on the testimony of Ryan, president of a city employee's association, that Market Street had no fixed point system as does the city under civil service in reference to promotions. He did testify, however, that the Market Street Railway Company, while it had no rigid point system in reference to promotions, always did take seniority of employees into account in such matters. Upon the consolidation of a private with a city-operated utility, it is not to be expected that the rules applicable to seniority rights in the two companies would be identical. If, as we believe, section 125 was intended simply to preserve to old employees of the Market Street Railway Company the benefits of their long service with the private utility, and to bring such employees into the city service on a parity with existing employees of the city, the fact that the section may, in some respects, have a retrospective effect does not affect its validity. A retrospective law is not necessarily invalid. "Neither the Federal Constitution nor the Constitution of California prohibits the enactment of retrospective laws. 5 Cal.Jur. 747, sec. 142. In California a statute is not invalid merely because it is intended to operate retrospectively. It may, however, be invalid if it deprives one of vested rights which are bound to be respected or protected by the state, or if it impairs the obligations of a contract. (5 Cal.Jur. 748, sec. 143.)" American States Water Service Co. v. Johnson, 31 Cal.App.2d 606, 613, 88 P.2d 770, 774.

[5, 6] Defendants, in further support of their position, refer to several general rules of statutory construction, and contend that these support their proposed interpretation. Some of these rules were relied upon in the Mullins case, supra, and the concurring opinion at least found that they did not compel the result now urged. These rules need not be considered *seriatim* nor need we give detailed consideration to the

interpretation of single words given in other cases involving a different statute and used in a context different than is used here. We are interested in ascertaining the intent of the people in adopting section 125 of the charter, as such intent is disclosed by the words used in the section. General rules of construction are at best but a very general guide to be used in attempting to ascertain that intent. Many of these rules conflict with or are inconsistent with each other. A different interpretation can be reached frequently, and in this case in particular, dependent upon which general rule is emphasized. Some of the suggested rules of construction support defendants' interpretation—some support the construction given the section by the trial court in the instant case, and the construction given the section in the concurring opinion in the Mullins case. We are interested in ascertaining intent, and in ascertaining that intention we should strive for a construction that is reasonable and fair. If, as was said in the concurring opinion in the Mullins case, the purpose and effect of section 125 was to provide that Market Street employees should be "continued in their respective positions" upon the consolidation, and if, as was also there stated "The charter guarantee is to a position substantially similar in kind and degree to the one held by them under Market Street" Mullins v. Henderson, 75 Cal.App.2d 117, 137, 170 P.2d 118, 131, there can be no escape from the conclusion that seniority rights of the Market Street employees must be protected. Not only is that a technical and correct interpretation of the word "continued," but, considering the purpose, intent, spirit, and background of the statute, it is a fair and reasonable interpretation.

Defendants, as they did in the Mullins case, express some fear that, in connection with retirement, such an interpretation will result in the "blanketed-in" employees claiming that they are entitled to retirement credits for past services with Market Street, so that the city will have to make large contributions to the retirement fund. There are enough points involved in the present appeal without considering points that are not involved. In response to the identical contention made in the Mullins case, the concurring opinion states 75 Cal.App.2d at page 137, 170 P.2d at page 132: "Appellant contends that such a construction would mean that the Market Street employees would be entitled to the retirement benefits provided for city and county employees. That conclusion by no means follows. The retirement system is a contributive one. The Market Street employees have not contributed for the period they were working for Market Street. Retirement benefits are not civil service benefits *per se*. They are the result of a special charter enabling provision, and statutes passed pursuant thereto. They have no relation to the 'kind' or 'degree' of position involved."

[7] When and if the point is presented it will be decided. While the result that will follow from a particular construction of a statute is certainly a factor to be considered in interpreting it, a fancied result that involves different factors and principles should not be given much weight.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

PEOPLE v. COX.

Cr. 4582.

District Court of Appeal, Second District,
Division 2, California.
Feb. 14, 1951.

Rehearing Denied Feb. 20, 1951.

Hearing Denied March 15, 1951.

Edward Jefferson Cox was convicted in the Superior Court of Los Angeles County, Joseph M. Maltby, J., for sex perversions and defendant appealed. The District Court of Appeal, McComb, J., held that the testimony was insufficient to constitute corroboration of an accomplice or show commission of the crime charged.

Judgment reversed and new trial ordered.

1. Criminal law ⚷507(7), 510

In sodomy prosecution, where the two complaining witnesses were each boys of 14 years and each knowingly, freely and voluntarily participated in the crime with defendant, the complaining witnesses were accomplices of defendant so that their testimony in order to sustain the conviction had to be corroborated. Pen.Code, §§ 288a, 1111.

2. Criminal law ⚷372(1), 511(4)

Evidence of similar acts tending to prove a lewd and lascivious disposition and tendency of defendant to commit a crime is admissible to prove the disposition and tendency upon the part of defendant, however such testimony is insufficient to constitute corroboration of an accomplice. Pen.Code, § 1111.

3. Criminal law ⚷511(4)

In sodomy prosecution, where the two prosecuting witnesses were each an accomplice of defendant but the acts forming the basis of prosecution were performed at different times separately with each witness, the testimony of each witness as to defendant's conduct with him did not tend to corroborate the testimony of the other witness as to the unlawful act committed with him. Pen.Code, §§ 288a, 1111.

4. Criminal law ⚷511(4)

In sodomy prosecution, the failure of defendant to take the witness stand and testify in denial or explanation of the charges made against him did not constitute corroboration of the testimony of two accomplices who testified against him. Pen.Code, §§ 288a, 1111; Const. art. 1, § 13.

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Fred N. Howser, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

Stratton & Taylor, Long Beach, for appellant.

McCOMB, Justice.

From a judgment of guilty on two counts of violating section 288a of the Penal Code after trial before the court without a jury, defendant appeals.

Facts: In the middle of March, 1950, defendant committed an act prohibited by section 288a of the Penal Code with a boy 14 years of age. Again on May 17, 1950, defendant committed an act prohibited by section 288a of the Penal Code upon another boy who was also 14 years of age.

Each of the witnesses stated that when he went to defendant's apartment where the prohibited acts were committed, he knew the purpose for which he was going there. The only evidence offered in support of the charges against defendant was the foregoing testimony of the two boys who participated with defendant in the illegal acts.

Questions: First: *Were the complaining witnesses accomplices of defendant so that their testimony in order to sustain a conviction must be corroborated?* (See section 1111 of the Penal Code.[1])

[1] This question must be answered in the affirmative. Since the prosecuting witnesses were of the age of 14 years they were capable of committing a crime, and since they knowingly, freely and voluntarily participated in acts prohibited by section 288a of the Penal Code, they were subject to prosecution for violating such section, the identical offense for which defendant was on trial. Therefore they were accomplices and their testimony, in order to sustain a conviction of defendant, must have been corroborated in accordance with section 1111 of the Penal Code. (People v. McCollom, 214 Cal. 601, 602, 7 P.2d 301; People v. McRae, 31 Cal.2d 184, 185 et seq., 187 P.2d 741.)

Second: *Did the testimony of each boy as to defendant's conduct with him tend to corroborate the testimony of the other*

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[1] Section 1111 of the Penal Code reads: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

boy who was an accomplice as to the unlawful act committed with him?

[2, 3] This question must be answered in the negative. Evidence of similar acts tending to prove a lewd and lascivious disposition, and the tendency of defendant to commit such acts is admissible to prove the disposition and tendency upon the part of a defendant. However such testimony is insufficient to constitute corroboration of an accomplice in accordance with the provisions of section 1111 of the Penal Code. Such evidence does not of itself tend to connect defendant with the offense charged or show the commission of the offense or the circumstances thereof. (People v. Reynolds, 26 Cal.App.2d 219, 221 et seq., 79 P.2d 150; People v. Singh, 121 Cal.App. 107, 109, 8 P.2d 898.)

Third: *Did the failure of defendant to take the witness stand and testify in denial or explanation of the charges made against him constitute corroboration of the testimony of the two accomplices who testified against him?*

[4] This question must also be answered in the negative. Article I, Section 13 of the Constitution provides that the failure of defendant to explain or deny by his testimony any evidence or facts in the case against him may be commented upon by the court or counsel and may be considered by the court or jury. However the failure of defendant to take the witness stand and deny or explain incriminating evidence introduced does not of itself directly and immediately tend to connect him with the crime charged, and such failure to testify does not constitute corroborative evidence of the testimony of an accomplice as required by section 1111 of the Penal Code. (People v. Sawaya, 46 Cal.App.2d 466, 471, 115 P.2d 1001; cf. People v. Adamson, 27 Cal.2d 478, 490, 165 P.2d 3.)

Each of the cases relied on by the people is factually distinguishable from the instant case which readily appears upon a reading thereof.

The judgment is reversed and a new trial is ordered.

MOORE, P. J., and WILSON, J., concur.

Hearing denied; SHENK, J., dissenting.

BOREN v. STATE PERSONNEL BOARD * et al.

Civ. 17681.

District Court of Appeal, Second District, Division 3, California.

Feb. 15, 1951.

Rehearing Denied March 7, 1951.

Hearing Granted April 12, 1951.

Action by Ralph Clinton Boren against the State Personnel Board of the State of California, and others, members, and the Department of Employment of the State of California, and others, to annul an order dismissing plaintiff from his civil service position as assistant medical director in the State Department of Employment. The Superior Court, Los Angeles County, William B. McKesson, J., rendered a judgment of dismissal, and the plaintiff appealed. The District Court of Appeal, Wood, J., held that the complaint was sufficient.

Judgment reversed with directions.

1. Pleading ⚷214(1)

To test legal sufficiency of complaint on demurrer, allegations of fact in complaint are deemed true.

2. Officers ⚷72(2)

In action to annul order dismissing plaintiff from civil service position as assistant medical director in state department of employment, complaint which, among other things, alleged that department of employment and its director and medical director offered no evidence whatever at hearing relative to place at which plaintiff had been employed to work and did not question or deny that plaintiff had been certified for appointment to position in certain area was not demurrable as omitting from complaint evidence in support of findings and decisions of state personnel board.

3. Officers ⚷72(2)

In action to annul order of state personnel board dismissing plaintiff from civil service position as assistant medical director in state department of employment, complaint alleging that plaintiff, when an applicant, had stated on official post card, sent to him by state authorities, that he would accept appointment for certain area only, and alleging that, prior to taking examination, state personnel board had represented that plaintiff's name would be certified for appointment only at location indicated, sufficiently alleged that it was a condition of plaintiff's appointment that he work only in stated area.

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* Subsequent opinion 234 P.2d 981.

4. Officers ⚷69.13

The statute providing that state appointing power may at any time transfer employee from one "position" to another in same class or another class having substantially similar responsibilities pertains only to transfer from one position to a new position without requiring employee to submit to another examination, but does not give appointing power right to transfer employee to distant place in state over employee's objection. Government Code, § 19360.

See publication Words and Phrases, for other judicial constructions and definitions of "Position".

5. Estoppel ⚷62(2)

Generally, there can be no estoppel against a state, but doctrine of equitable estoppel may apply as against state governments under circumstances which would estop a private individual, and such an estoppel may be asserted against either state or state agency.

6. Estoppel ⚷62(2)

State may be estopped where necessary elements or grounds of estoppel are present, and may be estopped by acts of its public officials done in exercise of power expressly conferred by law and by their acts or omissions when acting within scope of their authority.

7. Estoppel ⚷112

In action to annul order dismissing plaintiff from civil service position as assistant medical director in state department of employment, complaint alleging that state personnel board prior to examination had represented that board would allow employees to serve only at location at which they indicated willingness to serve, and that if plaintiff took examination and qualified, his name would be certified for appointment only at such a location, and alleging that plaintiff had stated he would not accept appointment except for service in a certain area sufficiently alleged an estoppel preventing state agency from asserting power after appointment to compel plaintiff to serve in other than designated portions of state.

◆

George E. Cryer and R. Alston Jones, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Bayard Rhone and Howard S. Goldin, Deputy Attys. Gen., for respondents.

WOOD, Justice.

Appeal from a judgment of dismissal entered upon an order sustaining a demurrer to the second amended complaint without leave to amend. By that complaint, plaintiff sought to annul an order dismissing him from his civil service position as assistant medical director in the Department of Employment of California.

It was alleged in the second amended complaint in part as follows: Plaintiff is a physician and surgeon licensed to practice as such in California. For purposes of administration of the affairs of the department of employment, the State of California is divided into three administrative areas, one of which has an area office located at Los Angeles and is known as the "Southern Area Office." The territory served from that office embraces those counties in the southern sector of the state, and it is commonly known as Southern California. About September 3, 1947, pursuant to certification from the civil service rolls, plaintiff was duly appointed to the position of assistant medical director in the department of employment in and for the southern area of California and at all times since said date plaintiff has been and is a civil service employee in the southern area office of the disability insurance section of defendant Department of Employment at a salary of $530 per month. Prior to his taking the civil service examination, the defendant State Personnel Board represented to plaintiff that it was the policy of said board to allow employees to serve only at a location at which they had indicated a willingness to serve, that if plaintiff took said examination for said position, and if he should qualify, his name would not be certified for appointment for service except at a location at which he had indicated a willingness to serve. For many years last past plaintiff has owned and maintained his home in Southern California and did not desire to accept employment elsewhere. In applying for said position, plaintiff relied upon said representations of said board relative to the location at which he would be required to serve, and in the course of his oral examination plaintiff stated to his examining board that he would not accept appointment except for service in Southern California. About July 21, 1947, after plaintiff had qualified in said examination, plaintiff received from defendant State Personnel Board, through the mail, a questionnaire in the form of a reply postal card, reading in part as follows:

"Position Assistant Medical Director, Department of Employment—

"Will you accept permanent work (more than 6 months) Yes or No

* * * * * *

"Certify my name for employment only in the following locations:

"(Blank for reply)

"I understand that my name will be certified in this classification only in accordance with the conditions set forth above, and I waive right to appointment to all other vacancies subject to my right to change the above information at any time."

That plaintiff inserted in the space in the above postal card, marked "blank for reply," the following:

"On and after September 1, 1947, as follows:

"(1) Part or full time at San Diego, California, and/or

"(2) Full time at Los Angeles, California or other Southern California area" ;
area";

On July 22, 1947, plaintiff signed said card, with blanks filled in as aforesaid, and deposited it in the mail addressed to defendant State Personnel Board. Thereafter said board duly certified plaintiff's name for appointment as assistant medical director in the department of employment at Los Angeles. On September 3, 1947, plaintiff was duly appointed as assistant medical director in said department for permanent work in the southern area office at Los Angeles. A photostatic copy of said card, as answered, completed, and mailed to said board, is attached to said complaint and marked "Exhibit A" and made a part thereof. About May 13, 1948, in violation of the above condition of his employment in said position, plaintiff's superior, defendant Bert S. Thomas, directed plaintiff to report for work at Sacramento, California, on May 18, 1948. Plaintiff declined to report for work at Sacramento, and in explanation of his action in so declining plaintiff stated to his said superior that he had not been certified by said board for service at Sacramento and he had not accepted appointment for service at said city; that it was a condition of his employment that he should serve only in Los Angeles or elsewhere in Southern California. By reason of plaintiff's refusal to report for work at Sacramento on said May 12th (18th) he was on May 19, 1948, suspended from his position without pay, pending the filing of charges against him. Ever since the making of said order plaintiff has been suspended from said position without pay. On May 21, 1948, pursuant to said order of suspension, the department of employment filed with said personnel board charges of insubordination and willful disobedience against plaintiff, based upon plaintiff's failure to report for work at Sacramento on said May 13th (18th). On July 1, 1948, within the time allowed by law, plaintiff filed his answer denying said charges, and alleging that his appointment was for service at Los Angeles and that it was a condition of his said employment contract that his field of service was to be limited and restricted to Southern California. On September 16, 1948, the matter of said charges came on for hearing before a hearing officer for said board, and on behalf of plaintiff said questionnaire card, "Exhibit A," was placed in evidence and plaintiff testified that the representation of said board that plaintiff would be required to serve only at Los Angeles or other Southern California area was a material inducement in causing him to accept appointment to said position; and that without such assurance on the part of said board plaintiff would not have accepted appointment to said position. The defendants offered no evidence whatever relative to this matter, and did not question or deny that plaintiff had been certified for appointment to the position of assistant medical director at Los Angeles, and did not deny that it was a condition of plaintiff's employment contract that he should not be required to work in his said position except at Los Angeles or other Southern California area. On January 9, 1949, said board made findings and rendered its decision, dismissing plaintiff from his said position and from any and all other positions which he holds or has eligibility for in said department of employment. Said board made no findings as to the location at which plaintiff had been appointed to serve, or as to the condition upon which he had accepted appointment to his position as set forth in said "Exhibit A," and said board entirely ignored plaintiff's defense that his employment contract, and said condition thereof, justified his failure to obey the order of his superior to report for duty at Sacramento and rendered him not guilty of the charge of willful disobedience. On January 15, 1949, plaintiff filed with said board his written petition for a rehearing in said matter, and on February 19, 1949, said petition was denied. Plaintiff has exhausted his administrative remedy.

[1, 2] Respondents (defendants) assert that there is no allegation in the second amended complaint relative to the evidence in support of the board's findings and decision sustaining appellant's dismissal. Of course, for the purpose of testing the legal sufficiency of a complaint, upon the hearing of a demurrer, the allegations of fact in the complaint are deemed to be true. In the second amended complaint, it was alleged that defendants offered no evidence whatever at said hearing relative to the place at which this plaintiff had been employed to work, and did not question or deny that plaintiff had been certified for appointment to the position of Assistant Medical Director at Los Angeles. It does not appear from said complaint (or a prior complaint) that any evidence in support of the findings and decision of the board was omitted from the said complaint.

[3] Respondents also assert that it was not a condition of appellant's employment that he work only in Los Angeles or other Southern California area; and that the postal card questionnaire constituted "a mere request for information changeable at the whim of the prospective employee, and nothing more." The above assertion is a denial of an allegation of said complaint that there was such a condition. The questionnaire, in the form of a reply postal card, which was sent by the board to appellant, recited in part as follows: "Certify my name for employment only in the following locations;" In the blank space on said card immediately following that statement, the appellant wrote as follows: "On & after September 1, 1947, as follows. (1) Part or Full time at San Diego, Calif. and/or (2) Full time at Los Angeles, Calif- or other So. Calif. area." On said card, immediately following said answers of appellant, there is the following statement which is a part of the mimeographed form on the card: "I understand that my name will be certified in this classification only in accordance with the conditions set forth above and I waive right to appointment to all other vacancies subject to my right to change the above information at any time." Appellant's signature is immediately below said last above mentioned statement. The sending of the card by the board to appellant inviting him to answer the questions thereon, and his answers and signature thereon, are circumstances corroborative of the allegations of said complaint that it was a condition of appellant's employment that he should serve only in Los Angeles or elsewhere in Southern California. Other facts alleged, supporting said allegations, are (1) that prior to taking the examination the board represented to plaintiff that it was the policy of the board to allow employees to serve only at a location at which they had indicated a willingness to serve; (2) that if he took said examination for the position of assistant medical director and if he should qualify, his name would not be certified for appointment for service ex-

cept at a location at which he had indicated a willingness to serve; and (3) that in the course of his oral examination he stated that he would not accept appointment, except for service in Southern California.

[4] Respondents also assert that appellant accepted the position with the knowledge that it was subject to the provisions of section 19360 of the Government Code. That section provides: "An appointing power may at any time transfer any employee under his jurisdiction from one position to another in the same class or in another class having substantially similar duties, responsibilities, and qualifications, and substantially the same salary range. In every such case the appointing power shall give written notice of his action to the board, according to board rule." It seems that respondents contend that said section gives the appointing power the right to transfer the employee to a distant place in the state, over the employee's objection, even though the employee had accepted the employment expressly upon the basis that he would not be required to serve at a place at which he had not expressed a willingness to serve. Such contention is not sustainable. The section pertains to the transfer from one position to a new position which is in the same class or another class wherein the duties, qualifications and salary are substantially the same; and the section confers authority upon the appointing power to transfer an employee to such a new position without requiring the employee to submit to another civil service examination. The word "position" in said section refers to the kind of work which the employee is presently performing or to which he may be assigned, and it does not refer to a geographical position or place in the state where the employee is performing work or where he may be assigned to perform work. The case of Noce v. Department of Finance, 45 Cal.App.2d 5, 113 P.2d 716, pertained in part to section 144 of the Civil Service Act, upon which said section 19360 was based. In that case the court said 45 Cal.App.2d at page 10, 113 P.2d at page 718: "Ordinarily a civil service employee may not be transferred from one distinct classification to another without competitive examination. [Citations.] The only exception to that rule is when the duties, qualifications, responsibilities and salaries of the different classifications are substantially the same." It is correct that the appellant herein accepted the position with the knowledge that it was subject to the provisions of said section 19360, but the provisions of the section do not authorize the appointing power to transfer an employee, over his objection, to a place in the state not contemplated by the contract of employment.

[5–7] Respondents assert further that estoppel will not be invoked against the state or its agencies where alleged representations of governmental employees are in direct conflict with a specific statute. They argue that said section 19360 precludes any claim of estoppel by appellant. As above indicated, the provisions of said section are not inconsistent with the alleged representations of respondents. "It has been broadly stated that there can be no estoppel against * * * a state. Nevertheless, subject to * * * exceptions * * * it is well established that * * * the doctrine of equitable estoppel may apply as against * * * state governments, and that under circumstances which would estop a private individual an estoppel may be asserted against * * * a state, or a state agency * * *." 31 C.J.S., Estoppel, § 140, p. 411. "A state * * * may be estopped where the necessary elements or grounds of estoppel are present * * * and it may be estopped by the acts of its public officials done in the exercise of powers expressly conferred by law, and by their acts or omissions when acting within the scope of their authority." People v. Gustafson, 53 Cal.App.2d 230, 242, 243, 127 P.2d 627, 634. see Tyra v. Board of Police etc. Comm'rs, 32 Cal.2d 666, 671, 197 P.2d 710. The allegations of the second amended complaint, regarding the circumstances under which the appellant was employed, were sufficient to plead estoppel.

The judgment is reversed, and the superior court is directed to overrule the demurrer and grant respondents time within which to answer.

SHINN, P. J., and VALLÉE, J., concur.

In re MESNER'S ESTATE.*

SINGER v. CRADICK.

CRADICK v. SINGER.

Civ. 17766.

District Court of Appeal, Second District.
Division 1, California.
Feb. 19, 1951.
Hearing Granted April 19, 1951.

Proceeding in the matter of the estate of Jennie Mesner, also known as Jennie Grawoig, deceased. Charles W. Cradick, executor of the estate, filed a petition for confirmation of his sale of realty of the estate to J. P. Singer, and J. P. Singer filed a petition to set aside sale of realty to him. The Superior Court of Los Angeles County, William P. Haughton, J., rendered orders adverse to J. P. Singer, and he appealed. The District Court of Appeal, Drapeau, J., held that orders vacating sale to J. P. Singer and ordering realty resold, and denying petition of J. P. Singer for a refund of deposit, were proper.

Orders affirmed.

See, also, Cal.App., 221 P.2d 740.

1. Executors and administrators 🔑379

Where purchaser of realty of deceased failed to pay balance of purchase price, served on executor a notice of rescission, and petitioned probate court to order return of the deposit to him, probate court properly vacated the sale. Probate Code, § 788.

2. Executors and administrators 🔑380(4)

On appeal by purchaser from order of probate court vacating sale of realty of deceased because of failure of purchaser to complete the purchase, evidence must be viewed most favorably to executor. Probate Code, § 788.

3. Executors and administrators 🔑380(4)

The presumption on appeal by purchaser from order of probate court vacating sale of realty of deceased because of failure of purchaser to complete the purchase, is that the order was correct. Probate Code, § 788.

4. Executors and administrators 🔑380(3)

On petition by purchaser of realty of deceased for return of the deposit made by purchaser, on ground that first bidders for realty had rescinded their offer to purchase realty before hearing in probate court on return of sale, and that he was not aware of such fact when he made his bid, verified return of sale by executor was sufficient evidence of acceptance of first bid. Probate Code, § 1233.

5. Evidence 🔑582(3)

Though a certified report of official reporter is prima facie evidence of testimony and proceedings, when objection is made in the trial of an issue of fact, a transcription of the reporter's notes, without foundation, may not be received in evidence, and proper way to elicit such evidence is to call reporter and have him testify to what happened at time in question, using his notes, to refresh his memory. Code Civ.Proc. §§ 273, 2002.

6. Executors and administrators 🔑375

Probate court was not deprived of jurisdiction to hear return of sale of realty of deceased to second bidder because first bidders had given notice that they rescinded their bid, since notice of rescission does not, in and of itself, terminate a contract.

7. Executors and administrators 🔑366

Where second bidder for realty of deceased raised bid returned by first bidders and offered certain amount in open court for the realty, such bid returned to probate court for confirmation was a binding contract on part of second bidder to purchase the realty, if no higher bid was made and accepted on the hearing on the return of sale.

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* Subsequent opinion 233 P.2d 551.

8. Executors and administrators ⚷339

Order of sale of realty of deceased to highest bidder was not void because probate court failed to examine witnesses, since it is not mandatory to examine witnesses in every probate sale.

9. Executors and administrators ⚷339

Though it is duty of probate court to ascertain that discretion of representative of deceased in selling realty of deceased has been exercised properly, and that sale was legally made and fairly conducted, the law does not require that witnesses must be sworn and examined at every probate sale. Probate Code, § 785.

10. Executors and administrators ⚷375

Fact that a probate court is informed of an attempted rescission of purchase of realty of deceased by first bidders, does not prevent confirmation of sale to second bidders.

11. Contracts ⚷318

Generally, the law does not favor forfeitures.

12. Executors and administrators ⚷372

Where highest bidder who agreed to purchase realty of deceased for $83,975, and who gave counsel for executor checks totalling $8,500 as a deposit, wrongfully refused to go through with the purchase, court properly declared a forfeiture of the entire deposit.

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Clarence Hansen, and Vernon S. Gray, Los Angeles, for appellant.

Dailey S. Stafford, Los Angeles, for respondent.

DRAPEAU, Justice.

The executor of the above-entitled estate made his return of sale of real property on a bid of $79,500. At the probate hearing Joseph P. Singer raised the bid returned, and offered in open court $83,975 for the property. The Court stated that the bid was accepted, and directed the executor to convey the property to Mr. Singer upon receipt of the purchase price in cash. Mr. Singer then signed a written bid, which was filed with the Clerk. At that time he gave counsel for the executor checks totalling $8,500 as a deposit. He requested counsel for the executor to have the order of sale direct that the executor's deed convey title to him and his wife as joint tenants. This was done.

The next day Mr. Singer opened an escrow in a bank, with instructions to vest title in him and his wife as joint tenants. The executor put into the escrow his deed and demand. The escrow holder forwarded the muniments of title to a title company for a report. When the report came in, the escrow holder advised Mr. Singer that the title was good, and that he should pay into escrow the balance of the purchase price.

But Mr. Singer failed to pay the balance of the purchase price. Subsequently he served upon the executor a notice of rescission, and petitioned the Probate Court to order return of the deposit to him.

He alleged that the first bidders had rescinded their offer to purchase before the hearing on the return of sale, and that he was not aware of this fact when he made his bid. He also alleged fraudulent representations by the executor inducing his bid.

The Probate Court found that the executor had not consented to the withdrawal of the offer by the first purchasers; that the return of sale was duly and regularly heard; that the property was duly sold to Mr. Singer in accordance with his bid; and that no fraud was practiced or perpetrated upon him.

The Court made two orders: (1) Vacating the sale to Mr. Singer, and ordering the property resold; and (2) denying Mr. Singer's petition for a refund. From these orders Mr. Singer appeals.

[1] Appellant does not seriously contend that the order vacating the sale was erroneous. Nor could he, because it is without dispute that he did fail to complete the purchase.

The balance of the purchase price was not paid, the order was made, and the court had jurisdiction. Probate Code, sec. 788. Therefore, no further attention will be paid to the appeal from that order.

With reference to the order denying return of the deposit, appellant argues that:

(1) The evidence does not support the order, and in particular the trial court disregarded appellant's evidence of fraud.

(2) The court was without jurisdiction to hear the return of sale, because the original bidders had rescinded and withdrawn their offer prior to the hearing.

(3) The sale was not legally made because the court failed to "examine * * * witnesses in relation to the sale" as directed by Section 785 of the Probate Code.

(4) The first bid was not accepted by the executor by notifying the bidders that their bid had been accepted.

(5) Error in sustaining objection to the admission of the reporter's transcript of proceedings upon the sale.

(6) The order is erroneous because it forfeits the deposit of $8,500, contrary to the direction of Section 788 of the Probate Code.

[2, 3] The record abundantly supports the findings of the trial court. As was said in Re Estate of Isaman, 68 Cal.App.2d 755, 157 P.2d 872, 873: "Appellant's argument proceeds upon the assumption that the evidence most favorable to him constitutes the record on appeal. This is false logic. The facts before this court are those determined by the court below, and they are attended by a presumption of their correctness. Successfully to attack the findings is possible only by showing that there was no substantial evidence received on behalf of the respondents."

[4] Appellant's suggestion that the probate court was without jurisdiction to hear the return because the first bid was not accepted by the executor is answered by the finding of the court to the contrary. The verified return of sale by the executor is sufficient evidence of the acceptance of the first bid. Probate Code, sec. 1233.

[5] No error appears in the exclusion of the reporter's transcript of proceedings upon the hearing on the return of sale. It was objected that the transcript offered did not correctly set forth what happened on the hearing, or all that happened. What was sought to be put in evidence was what was said and done upon the hearing. While a certified report of the official reporter is prima facie evidence of testimony and proceedings, Code Civ.Proc., sec. 273, when objection is made in the trial of an issue of fact, a transcription of the reporter's notes, without foundation, may not be received in evidence. The proper way to elicit such evidence is to call the reporter and have him testify to what happened at the time in question, using his notes to refresh his memory. Code Civ.Proc., sec. 2002; In re Estate of Benton, 131 Cal. 472, 63 P. 775.

[6] Appellant's contention that the court was without jurisdiction to hear the return of sale, because the first bidders had rescinded their bid, is without merit. It is elementary in the law of contracts that a notice of rescission in and of itself does not and cannot terminate a contract.

[7] The bid returned to the probate court for confirmation was a binding contract on the part of the bidders to purchase the property, if no higher bid was made and accepted on the hearing on the return of sale. Baldwin v. Stewart, 218 Cal. 364, 23 P.2d 283; Barnes v. Morrison, 102 Cal. App. 152, 282 P. 986.

[8] Appellant's next contention, that the order is void because the probate court failed to examine witnesses, is likewise without merit. It is not mandatory to examine witnesses in every probate sale. To require it would clog the business of probate courts, and present an unrealistic approach to the necessity for dispatch of judicial matters.

[9] While it is the duty of the court to ascertain that the discretion of the representative in selling has been exercised properly, In re Estate of George, 123 Cal.App. 733, 12 P.2d 86, and that the sale was legally made and fairly conducted, Probate Code, sec. 785, the law does not require that witnesses must be sworn and examined at every probate sale.

[10] Appellant argues that if the court had examined witnesses on the hearing the fact that the first bidders had attempted to rescind their contract would have appeared. This does not necessarily follow. Under the facts in this case, if the court had

been advised of the attempted rescission by the first bidders, confirmation of the sale to the second bidder would not have been an abuse of discretion.

[11] Appellant's last argument—in fact his only argument with any substantial merit—is that it is inequitable to forfeit his entire deposit of $8,500. His position is supported by the concluding sentence of Probate Code, sec. 788: "If the amount realized on such resale does not cover the bid and the expenses of the previous sale, the defaulting purchaser at such previous sale is liable to the estate for the deficiency." And his position is supported by the general policy of the law which does not favor forfeitures.

[12] However, the case of Barnes v. Morrison, supra, specifically holds that when the purchaser breaches his contract in a probate sale the administrator has a right to retain the deposit. Also see Baldwin v. Stewart, supra.

Said orders, and each of them, are affirmed.

WHITE, P. J., and DORAN, J., concur.

COVERSTONE v. DAVIES et al.*

MOCK v. DAVIES et al.

MOCK et al. v. DAVIES et al.

Civ. 18020–18022.

District Court of Appeal, Second District,
Division 2, California.

Feb. 16, 1951.

As Corrected Feb. 27, 1951.

Rehearing Denied March 5, 1951.

Hearing Granted April 16, 1951.

Actions by Warren Coverstone, a minor, by Arthur L. Erra, as his guardian ad litem, and by William L. Mock, a minor, by Juanita L. Old, as his guardian ad litem, and by Rolla D. Mock and Velma M. Mock against L. N. Davies, individually and as a Deputy Sheriff of the County of Los Angeles, R. M. Chase, individually and as jailer of City Jail of city of Pasadena, Ben Brown and others for false arrest, malicious prosecution, assault and battery, and conspiracy and trespass. The Superior Court of Los Angeles County, Thurmond Clarke, J., rendered judgments of nonsuit in the three actions which were consolidated for trial before a jury and plaintiffs appealed. The District Court of Appeal, McComb, J., held that fact that complaint against plaintiffs was filed after consultation with district attorney did not act as a complete bar to action in view of fact that jury might have believed the officers did not file complaint in good faith.

Judgment affirmed as to plaintiffs Rolla D. Mock and Velma M. Mock and also affirmed as to defendants Chase and Brown, and as to all other defendants reversed.

1. Parent and child 🔑7(1)

No cause of action lies in favor of parent for malicious prosecution or false imprisonment of his child.

2. Action 🔑13

A right of action for mental suffering to person is restricted to person who receives injury.

3. Malicious prosecution 🔑41

The right to maintain an action for malicious prosecution is a personal one, and father cannot bring an action to recover in his own right because of wrongful prosecution of his minor children which has caused suffering to him although he may bring action in capacity of tutor for injured minors and may sue for a malicious prosecution of a child which results in actual loss of his services.

4. Malicious prosecution 🔑41

A corporation may not maintain an action of malicious prosecution for recovery of damages sustained by it by reason of malicious prosecution of a proceeding against one of its officers.

5. Malicious prosecution 🔑71(1)

Where there was nothing in record to show that defendant jailer was present when plaintiffs were booked on charge of unlawful assembly for which charge they were later acquitted, there was no evidence to sustain a judgment against him in action for malicious prosecution and nonsuit was properly granted. Pen.Code, § 407.

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* Subsequent opinion 239 P.2d 876.

6. Malicious prosecution ⚷71(1)

Where there was nothing in record to show that defendant police officer participated in any of alleged wrongful acts relating to booking of plaintiffs on charge of unlawful assembly on which charge they were later acquitted, and no evidence which showed that officer was negligent in selection of his subordinates, nonsuit as to defendant in malicious prosecution action was properly entered.

7. Malicious prosecution ⚷22

Fact that complaint charging plaintiffs with unlawful assembly was filed after consultation by police officers with district attorney did not act as complete bar to action in view of fact that jury might have believed that officers did not file complaint in good faith, since it was disclosed that in a conference at which one of deputies was present prior to time complaint was filed it was stated that "we are afraid of a law-suit" and "unless we are released from liability we will have to sign a complaint to protect ourselves".

8. Sheriffs and constables ⚷100

A sheriff is liable for improper acts of his deputies.

9. Municipal corporations ⚷189(1)

Under statute providing that any person injured or aggrieved by wrongful act or default of an officer in his official capacity may bring suit on official bond given pursuant to law in his own name, plaintiffs could maintain action for malicious prosecution against bonding companies on bonds of police officers even though plaintiffs were not named in bonds. Government Code, § 1550(b).

◆

C. Paul DuBois, Los Angeles, for appellant.

H. Burton Noble, City Atty., Frank L. Kostlan, Asst. City Atty., and Robert E. Michalski, Deputy, all of Pasadena, for respondents I. M. Frakes, Jr., R. N. Chase, Ben Brown, Clarence H. Morris, and Harold M. Hines.

Crider Runkle & Tilson and Donald Ruppe, all of Los Angeles, for respondents American Bonding Company of Baltimore and Fidelity & Deposit Company.

Harold W. Kennedy, County Counsel, William E. Lamoreaux, Deputy, Los Angeles, for respondents L. N. Davies, E. V. Mansell, R. A. Cook, W. C. Mortenson, N. L. Hoskins, William Knezevich.

Anderson, McPharlin & Conners, Los Angeles, for respondent Hartford Accident & Indemnity Co.

McCOMB, Justice.

These are appeals from judgments of nonsuit rendered by the trial court in three actions which were consolidated for trial before a jury. All three actions are based on the arrest of Warren Coverstone and William L. Mock for a violation of section 407, Penal Code (unlawful assembly), and their subsequent trial wherein they were acquitted.

In the actions in which the two boys are plaintiffs the complaints included causes of action for (a) false arrest, (b) malicious prosecution, (c) assault and battery, and (d) conspiracy and trespass. In the third case the father and mother of William Mock are plaintiffs and their complaint contains counts of invasion of privacy, trespass, conspiracy and negligence predicated upon the arrest and prosecution of their son.

The defendants in all three actions are the Sheriff of Los Angeles County, five of his deputies, the bonding companies on the bond of the sheriff and his deputies; the City Manager, Chief of Police and three police officers of the City of Pasadena and the bonding company on the official bonds of these officers.

Facts: At about 9 a.m. of January 17, 1947, some 29 Pasadena Junior College students, including plaintiffs Coverstone and Mock, assembled on Sierra Madre Villa Street in county territory. They were congregated in various groups on both sides of the street and had arrived there in five or six automobiles owned and operated by members of the group, the two boys in question riding in cars driven by their classmates.

While they were so gathered, three of the cars lined up and took off in a race in a westerly direction on Sierra Madre Villa. Defendants N. L. Hoskins and E. V. Mansell, two of the deputy sheriffs arrived at the scene in a sheriff's patrol car and the assembled students dashed to the remaining cars in an attempt to get away. The two officers held the group together and the three cars which had engaged in the race returned.

Shortly thereafter another sheriff's car arrived containing defendants Davies and Cook of the sheriff's office, and two other deputy sheriffs. The group of students was escorted to the sheriff's Altadena substation and after questioning the desk sergeant ordered defendants Mortenson and Knezevich to take plaintiffs Coverstone and Mock to the Pasadena city jail and book them. After being booked at the jail the two boys were released at about 3 p.m.

January 29, 1947, defendant Davies, after conferring with deputy district attorney Hopkins and upon his advice, signed and filed complaints against the two boys charging them with violation of section 407 of the Penal Code.

The accused were acquitted by a jury.

Plaintiffs contend that the trial court improperly granted defendants' motions for nonsuit.

First: As to plaintiffs Rolla D. Mock and Velma M. Mock the trial court properly granted the motion for nonsuit.

The rule is correctly stated in 39 American Jurisprudence (1942), Parents and Children, pages 719, 720, section 75, as follows:

[1, 2] "Likewise, no cause of action lies in favor of the parent for the malicious prosecution or false imprisonment of his child, even where his wife dies as a result of the shock, although recovery will be allowed where there is an actual loss of the services of the child. And although there is authority to the contrary, it is held in the preponderant line of decisions that the child only, not the parents, can sue for its wrongful expulsion from school. Refusal to permit recovery in these cases is in accord with the general rule restricting a right of action for mental suffering to the person who receives the injury."

In 34 American Jurisprudence (1941), Malicious Prosecution, Page 754, section 82, it is stated:

[3, 4] "Generally speaking, any person bringing himself within the requirements previously enumerated in this article may maintain an action for malicious prosecution. The right, however, seems to be purely a personal one. Thus, it has been held that a father cannot bring an action to recover in his own right because of a wrongful prosecution of his minor children which has caused suffering to him, although he may bring the action in the capacity of tutor for the injured minors, and may sue for a malicious prosecution of a child which results in actual loss of his services. It has also been held that a corporation may not maintain an action of malicious prosecution for the recovery of damages sustained by it by reason of the malicious prosecution of a proceeding against one of its officers."

The foregoing rules are applicable to plaintiffs Mock, and under such rules the evidence failed to show any cause of action on their behalf which would have supported a cause of action against defendants or any of them.

[5] Second: Defendant Chase, the jailer, was not present when plaintiffs Mock and Coverstone were booked, therefore there was no evidence to sustain a judgment against him, and the nonsuit was properly granted.

[6] Third: There is nothing in the record to show that defendant Brown participated in any of the alleged wrongful acts and there is a total failure of any evidence which discloses that he was negligent in the selection of his subordinates. Therefore the court properly ordered a nonsuit as to such defendant.

Fourth: As to defendants Biscailuz, Davies, Mansell, Cook, Mortenson, Hoskins, Knezevich, Morris, Hines and Frakes, viewing the evidence in the light most favorable to plaintiffs, as it must be on a motion for nonsuit, it would support a judgment in favor of each of the plaintiffs other than plaintiffs Rolla D. Mock and Velma M. Mock on each cause of action alleged in their complaints.

[7] The fact that the complaint was filed after consultation with the district attorney did not act as a complete bar to the action in view of the fact that the jury might have believed that the officers did not file the complaint in good faith, since it was disclosed that in a conference at which one of the deputies was present prior to the time the complaint was filed, it was stated that "We are afraid of a law-suit" and "unless we are released from liability we will have to sign a complaint to protect ourselves."

[8] Hence, had the jury found that the prosecution was not instituted in good faith, the fact that they had consulted with the district attorney prior to the commencement of the same did not protect them. It needs no citation of authority in support of the proposition that the sheriff is liable for the improper acts of his deputies. As to these defendants the trial court improperly granted the motion for nonsuit and it must be reversed.

Fifth: As to Fidelity and Deposit Company and the American Bonding Company of Baltimore, since they issued bonds covering the county officers, the motion was improperly granted as to them and must be reversed. The same situation obtains relative to defendant Hartford Accident and Indemnity Company which issued a bond covering the officials of the City of Pasadena.

[9] There is no merit in the contention that plaintiffs may not maintain an action against the bonding companies since they are not named in the bonds, because section 1550 of the Government Code, subsection (b), provides that any person injured or aggrieved by the wrongful act or default of an officer in his official capacity may bring suit on the official bond given pursuant to law in his own name. (See Abbott v. Cooper, 218 Cal. 425, 430 et seq., 23 P.2d 1027; Union Bank & Trust Co. v. Los Angeles County, 11 Cal.2d 675, 679, 81 P.2d 919.

1. The judgment is affirmed as to plaintiffs Rolla D. Mock and Velma M. Mock. It is also affirmed as to defendants Chase and Brown.

2. The judgments are reversed as to defendants Davies, Mansell, Cook, Mortenson, Hoskins, Knezevich, Biscailuz, Morris, Hines, Frakes, Fidelity and Deposit Company, American Bonding Company of Baltimore and Hartford Accident and Indemnity Company on the complaints filed by Warren Coverstone and William L. Mock.

MOORE, P. J., and WILSON, J., concur.

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102 Cal.App.2d 288

RUBIN v. AMERICAN SPORTSMEN TELEVISION EQUITY SOC., Inc., et al.

Civ. 18313.

District Court of Appeal, Second District,
Division 1, California.

Feb. 15, 1951.

Rehearing Denied March 5, 1951.

Hearing Denied April 12, 1951.

Harry Rubin sued American Sportsmen Television Equity Society, Inc., a corporation, and others, to enjoin defendants from picketing wrestling matches promoted by plaintiff. The Superior Court of Los Angeles County, W. Turney Fox, J., granted a preliminary injunction, and denied a stay pending appeal, and defendants filed notice of appeal and made application for a writ of supersedeas pending the appeal. The District Court of Appeal, Drapeau, J., held that the writ must be denied since the preliminary injunction complained of was prohibitory and not mandatory and would not prevent defendants from perfecting their organization as a labor union pending the final outcome of their appeal, and, on the other hand, if the writ were granted and the petitioners continued their picketing the plaintiff might well find himself out of business because of his patrons' refusal to cross the picket lines.

Writ denied.

1. Appeal and error 🔑458(3), 479(1)

Where injunction is mandatory in character, it is automatically stayed by appeal, and upon mistaken attempt of trial court to enforce it appellant is entitled as matter of right to issuance of writ of supersedeas. Const. art. 6, §§ 4, 4b.

2. Appeal and error 🔑458(3), 479(2)

Where injunction is prohibitory, it is self-executing and its operation is not stayed by appeal and appellant is not entitled to writ of supersedeas as matter of right, but appellate court has inherent power to issue writ if such action is necessary or proper to complete exercise of its appellate jurisdiction. Const. art. 6, §§ 4, 4b.

3. Appeal and error 🔑478

In considering petition for writ of supersedeas to stay enforcement of prohibitory injunction, averments going to merits of appeal were not matter of concern to appellate court. Const. art. 6, §§ 4, 4b.

4. Appeal and error 🔑479(1)

On petition by purported professional athletes organization concerned with television rights of its members for writ of supersedeas to stay enforcement of preliminary injunction prohibiting picketing of wrestling matches, where it appeared that preliminary injunction complained of was prohibitory and not mandatory and therefore would not prevent petitioner from soliciting memberships pending final outcome of appeal, and that, on other hand, if writ were granted and picketing continued wrestling promoter might well find himself out of business because of refusal of patrons to cross picket line, writ would be denied.

Richard A. Perkins, Los Angeles, and W. M. Freiburghouse, South Gate, for petitioners.

Cyril Moss, Hollywood, and George Appell, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff sought injunctive relief and $5,000 damages by his complaint filed October 13, 1950, which alleges among other things that he is a duly licensed promotor of wrestling matches conducted every Thursday evening in the Long Beach Municipal Auditorium in Long Beach, California. And that under an agreement of April 7, 1950, plaintiff gave the right to a certain corporation to televise these exhibitions at a compensation mutually agreed upon; that compensation for the television rights of the performing wrestlers is paid directly to them by the corporation. Plaintiff claims that the relationship between him and these wrestlers, insofar as their television activities are concerned, is that of independent contractors; that defendant corporation is not a labor organization and has no charter from any parent labor union, but was organized for the purpose of compelling membership therein of the professional wrestlers in this State. Also, that in furtherance of a "scheme to receive a percentage of the money paid to wrestlers for their television rights and to injure plaintiff in the conduct of his business", defendants have falsely pretended that a labor dispute exists between them and plaintiff, and between plaintiff and the wrestlers, and on two separate occasions unlawfully established picket lines around the entrance to the Long Beach Municipal Auditorium, which picketing they have threatened to continue. That plaintiff in the conduct of such wrestling matches has built up a valuable and profitable patronage as promotor which has earned the good will of many patrons in Long Beach and adjacent territory. That many of these have refused to cross defendants' picket lines; and unless defendants are restrained from such picketing, "plaintiff will suffer irreparable financial injury thereby in loss of business and patronage, and will also lose the consideration he has heretofore received from the televising of said wrestling matches."

Order to show cause issued, and upon hearing thereon, a demurrer to the complaint was overruled, and a preliminary injunction was granted "during the pendency of this action, or until the final determination thereof, or until the court shall otherwise order", enjoining and restraining defendants from "forming a picket line around the Long Beach Municipal

Auditorium, Long Beach, California, or patrolling the streets in front of said premises, in groups, or bearing signs at or around said premises, with the inscription 'Unfair to Organized Labor', or words similar thereto, when plaintiff conducts wrestling contests therein." It was also ordered that plaintiff file an undertaking in the sum of $5,000.

Thereafter, defendants' motion to dissolve the preliminary injunction or to stay the same pending appeal was denied. Defendants then filed their notice of appeal from the order granting the injunction and also from the order refusing to dissolve the same. They are now before this court seeking a writ of *supersedeas* to stay the enforcement of the preliminary injunction pending appeal from the order granting it.

[1, 2] "The law governing issuance of the writ of *supersedeas* to stay operation of an injunction pending an appeal therefrom is well settled. If the injunction is mandatory in character, it is automatically stayed by the appeal, and upon a mistaken attempt of the trial court to enforce it, the appellant is entitled as a matter of right to issuance of the writ of *supersedeas*. If on the other hand the injunction is prohibitory, it is self-executing and its operation is not stayed by the appeal. * * * Even in the case of a purely prohibitory decree, however, where there is no automatic stay and the appellant is not entitled to a writ of *supersedeas* as a matter of right, this court has inherent power to issue the writ if such action is necessary or proper to the complete exercise to its appellate jurisdiction. Ohaver v. Fenech, supra [206 Cal. 118, 273 P. 555]; People v. Associated Oil Co., 211 Cal. 93, 294 P. 717; Goodall v. Brite, 1 Cal.2d 583, 586, 36 P.2d 190; Dry Cleaners & Dyers Inst. v. Reiss, 5 Cal.2d 306, 310, 54 P.2d 470; Nuckolls v. Bank of California, 7 Cal.2d 574, 61 P.2d 927; Clayton v. Schultz, 12 Cal.2d 703, 708, 87 P.2d 355." Food & Grocery Bureau v. Garfield, 18 Cal.2d 174, 176, 114 P.2d 579, 580.

"*Supersedeas* is not a writ of right, but is one resting in the discretion of the appellate court. * * * It is issued in aid of the appellate jurisdiction, and finds sanction in sections 4 and 4b of article 6 of the Constitution." Private Investors v. Homestake Mining Co., 11 Cal.App.2d 488, 492, 54 P.2d 535, 536.

And, as stated in 2 Cal.Jur. 465, sec. 217: "The statutory law gives no stay of proceedings upon a prohibitory injunction. In consequence, it is an open question in this state whether the appellate courts have power to stay the force of an injunction on the ground it is necessary or proper to the complete exercise of its appellate jurisdiction. Assuming jurisdiction to exist, that court will not, in a proceeding for such a stay, review the correctness of the lower court's determination that an injunction was essential or proper. The appellate court must, however, consider the rights of the respondent as well as of the appellant, and contemplate the possibility of an affirmance as well as a reversal. If, therefore, a stay can be granted only at the risk of destroying rights which will belong to the respondent if the judgment is affirmed, it cannot be said to be necessary or proper to the complete exercise of appellate jurisdiction. Hulbert v. California-Portland Cement Co., 161 Cal. 239, 118 P. 928, 38 L.R.A.,N.S., 436.

Said the court in Food & Grocery Bureau v. Garfield, supra, 18 Cal.2d 174, 177, 114 P.2d 581, the test to be applied by an appellate court in exercising its power to issue the writ is not "a balancing of conveniences or hardships", but rather "a consideration of the respective rights of the litigants, which contemplates the possibility of an affirmance of the decree as well as of a reversal."

[3] The petition for the instant writ contains many averments going to the merits of the appeal; hence are not matters of concern in the instant proceeding. French Art Cleaners v. State Board of Dry Cleaners, 88 Cal.App.2d 45, 47, 198 P.2d 91.

However, among other things, it is alleged that "The preliminary injunction prevents Television Equity from publicizing the facts of the dispute among the respondent's employees and patrons, seeking their support, and thereby gaining recognition and consequent benefits for its members and other professional athletes. * * The whole object of the existence of Television Equity is thereby frustrated. Television Equity is a young organization, having been organized in 1949. Its small membership was growing when the preliminary injunction issued and stopped further progress. An organization such as this, new, unaffiliated, and still in the organization stage, is peculiarly vulnerable to being seriously injured or even destroyed by the improvident issuance of a crushing injunction such as this one. Reversal on appeal many months hence would not repair the damage done."

[4] It is quite obvious that the preliminary injunction complained of is prohibitory and not mandatory. Compliance with its terms does not require petitioners to do anything. They are merely required to refrain from picketing the Long Beach Municipal Auditorium during the hours when respondent is using it for his wrestling exhibitions, viz.: Thursday evening of each week. It does not prevent them from proceeding to perfect their organization as a labor union, nor from soliciting membership therein, pending the final outcome of their appeal.

On the other hand, if the writ is granted and petitioners continue their picketing, respondent may well find himself out of business, catering, as he does, to a group of patrons who refuse to cross a picket line.

The following statement from Dry Cleaners & Dyers Institute v. Reiss, 5 Cal. 2d 306, 310, 54 P.2d 470, 471, appears particularly appropriate:

"The purpose of the writ of *supersedeas* is to maintain the subject of the action *in status quo* until the final determination of the appeal, in order that the appellant may not lose the fruits of a meritorious appeal. Conceding that this court has the power to issue such a writ suspending the execution of a prohibitory injunction, no sufficient showing has been made in this proceeding which would justify the court in issuing the writ. The defendants are permitted to continue in business and to carry it on as before with the single exception that they must conform to the injunctive order of the court as to prices. No showing is made whatever that they, or either of them, will suffer irreparable injury, or any injury, whatever by meeting the conditions of the injunction. They, therefore, have not presented to this court a state of facts sufficient to justify it in exercising its power in their behalf. Hulbert v. California Portland Cement Co., 161 Cal. 239, 246, 118 P. 928, 38 L.R.A.,N.S., 436; Ohaver v. Fenech, 206 Cal. 118, 124, 273 P. 555." See, also, Board of Dental Examiners v. Jameson, 23 Cal.2d 689, 691, 145 P.2d 905.

The petition for the writ of *supersedeas* is denied.

WHITE, P. J., and DORAN, J., concur.

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102 Cal.App.2d 198

CLARK v. CITY OF PASADENA et al.

Civ. 18108.

District Court of Appeal, Second District, Division 2, California.

Feb. 8, 1951.

Loyal H. Clark filed a petition against the City of Pasadena, a municipal corporation, and others, for writ of mandamus to compel Retirement Board to retire petitioner from the police force upon the pension to which petitioner claimed to be entitled under the provisions of the city charter adopted in 1919. The Superior Court of Los Angeles County, Kurtz Kauffman, J., rendered a judgment adverse to the petitioner and the petitioner appealed. The District Court of Appeal, Wilson, J., held that amendments to city charter of 1935 and 1937 were valid and superseded the amendments of 1919 pursuant to which petitioner had proceeded.

Judgment affirmed.

1. Pleading 🔑343

A defendant's motion for judgment on pleadings must be determined on same principles as if it were a demurrer to complaint on same ground.

2. Evidence ⚿29

A freeholders' charter is a public statute of which judicial notice will be taken. Code Civ.Proc. § 1875, subd. 3.

3. Statutes ⚿47

If practicable interpretation of amendment to city charter can be found, court must adopt it and sustain enactment.

4. Statutes ⚿47

A statute will not be stricken down for uncertainty if a reasonable and usable construction can be given to its language, and it will not be rendered nugatory by fact that there may be difficulty in ascertaining its meaning or by possibility of different interpretations.

5. Constitutional law ⚿48

All presumptions and intendments are in favor of constitutionality of a statute and all doubts are resolved in favor of its validity and not against it.

6. Statutes ⚿47

A statute is not necessarily void because it is vague, indefinite, or uncertain, or because intention of legislature might have been expressed in plainer terms and opinions may differ in respect of what falls within its terms, and a statute will not be declared void for vagueness and uncertainty where meaning thereof may be implied.

7. Municipal corporations ⚿187(7)
Statutes ⚿47

1935 amendment to charter of city of Pasadena changing retirement compensation of police officers, and providing formula for computing retirement allowance, and 1947 amendment giving members of retirement system option of retiring at age of 51 after having rendered at least 20 years of service but reducing retirement allowance he would have received if officer had remained in service until normal retirement age was reached, were not so vague, uncertain and indefinite as to be incapable of enforcement, and did not leave to a ministerial officer duty or power to define rights of members of retirement system, and both amendments were valid and superseded amendments of 1919 which police officer contended governed benefits to which he was entitled upon retirement. St.1919, pp. 1505, 1506, 1508, 1509, art. 6, § 11(d, n); St. 1935, pp. 2321, 2325, 2326, 2328, 2329, 2332, art. 6, §§ 1 et seq., 9, 10(b), 14(a, b, d); St. 1947, p. 3487, art. 6, § 14(a).

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J. H. Morris, Hollywood, Walter H Duane, San Francisco, for appellant.

H. Burton Noble, City Atty., Frank L. Kostlan, Asst. City Atty., Robert E. Michalski, Deputy City Atty., all of Pasadena, for respondents.

WILSON, Justice.

By this appeal we are required to construe portions of the charter of the city of Pasadena relating to pensions of retired members of the police department.

Petitioner is a police officer of the city of Pasadena. He filed with the Retirement Board an application for retirement upon the pension to which he claims he is entitled under the provisions of the city charter adopted in 1919. Upon denial of his application he filed in the superior court a petition for a writ of mandate to compel the board to comply with his demand. Defendant answered and pleaded as a defense that he is entitled to such benefits, if any, as are provided in amendments to the city charter adopted in 1935 and 1947. On defendants' motion judgment on the pleadings was entered in their favor from which petitioner has appealed.

[1, 2] The answer cannot be considered on the motion for judgment on the pleadings. Such motion must be determined on the same principles as if it were a demurrer to the complaint on the same ground. Douglass v. Dahm, 101 Cal.App.2d 125, 224 P.2d 914, 916. However, since a freeholders' charter is a public statute, Adams v. Wolff, 84 Cal.App.2d 435, 440, 190 P.2d 665; Leahey v. Department of Water and Power, 76 Cal.App.2d 281, 286, 173 P.2d 69, of which the court takes judicial notice, Code Civ.Proc. sec. 1875(3); Thompson v. City of Los Angeles, 82 Cal.App.2d 45, 47, 185 P.2d 393; Teachout v. Bogy, 175 Cal. 481, 485, 166 P. 319, the same defense is available without recognition of the allegations in the answer.

In October, 1925, petitioner became and at all times since has been an employee of the police department in good standing; he was 56 years of age at the time his petition for retirement was filed; since 1939 he has held the rank of detective and for more than one year prior to his application for retirement his monthly salary had been $359.55. Having been a member of the police department for more than 20 years and having reached the age of 56 years he asserts the right, pursuant to subsection (d) of section 11 added to article 6 of the City Charter in 1919,[1] Stats.1919, pp. 1505, 1506, to be retired upon a monthly pension of $179.77, one half of the salary he had received for the preceding year.

Defendants maintain that the amendments to the charter adopted in 1935 and 1947 are the guide to be followed in fixing retirement allowances for police officers and that those amendments repealed the 1919 amendment which included subsection (d) of section 11 of article 6, while petitioner contends that the latter provision is still in force by reason of the fact that the 1935 and 1947 amendments are void for uncertainty.

By an amendment to the city charter in 1935 article 6, entitled "Police and Fire Departments and Retirement System", was revised and amended. Stats.1935, p. 2321. Subsection (a) of section 14, p. 2328, provided: "Members of the Retirement system may retire for service at their option upon attaining an age of at least fifty-seven years if they be members of the Fire Department, or sixty years if they be members of the Police Department, but only after rendering at least twenty years of service to the city in either or both of said departments. * * *" By subsection (d)[2] of section 14, p. 2332, the retirement compensation was changed from an amount equal to one half of the amount of salary attached to the rank or position held by the retiring member for a period of one year next preceding the date of retirement to approximately one half of the member's final compensation. The term "final compensation" is defined in section 10 of article 6, p. 2326, as "the average monthly compensation earnable by a member during the ten years immediately preceding his retirement, or death before retirement."

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[1] Subsection (d), 1919 amendment: "Whenever any member of either [Police or Fire] Department, as defined in clause 'n' hereof shall have served twenty (20) years or more in the aggregate in any capacity or rank whatever therein, and shall have attained the age of fifty-five (55) years, said Board may, upon his written request, or without such request if it be deemed for the good of the department where he serves, order and direct that such member be retired from further service in the department. From the date of making such order, or from the date such order becomes effective, the services of such member in the department shall cease and such member so retired shall thereafter during his lifetime, be paid a yearly pension equal to one-half the amount of the salary attached to the rank or position which he may have held in said department for the period of one year next preceding the date of such retirement. Such pension shall be payable in equal monthly installments. * * *"

(Clause "n" referred to in subsection (d) above provides that the members of the Police Department who are entitled to retire pursuant to section 11 of article 6 "include the Chief, subordinate officers, patrolmen, and all persons duly and regularly appointed therein whose duty it is to preserve the peace to prevent injury to life and property or to suppress crime and disorder in the City of Pasadena. * * *" Stats.1919, pp. 1508–1509.)

[2] Subsection (d), 1935 amendment: "The normal contributions which shall be required as a deduction from the compensation of each member throughout his membership shall be such as, on the average for such member, if his service on full salary be uninterrupted and when accumulated with interest, added to the equal accumulated contributions of the city and applied according to the tables and rates recommended by the actuary and approved by the Retirement Board as hereinbefore provided, will provide a retirement allowance upon retirement for service at the age of fifty-seven years if he be a member of the Fire Department or sixty years if he be a member of the Police Department, or upon completion of twenty years of service at an age higher than fifty-seven years if he be a member of the Fire Department or sixty years if he be a member of the Police Department, equal to one-half of his final compensation, less that part of the retirement allowance set forth in the first sentence of subsection (b) of this Section 14, which is to be provided by contributions of the city on account of service rendered prior to the effective date hereof."

Subsection (b)[3] of section 14 of article 6, pp. 2328–9, provides the formula for computing the retirement allowance. Upon a casual first reading of subsection (b) it might appear to have been drafted by an advanced student of obscurantism but upon a close examination and analysis it is not so vague and uncertain as not to be understandable and interpretable with reasonable definiteness, although there is much to be desired in precision of expression and its clarity could be greatly improved upon.

It is agreed that the charter amendments of 1935 became effective on July 1 of that year. Prior thereto members of the fire and police departments did not contribute to the retirement fund, the city having contributed the entire amount. The formula for computation of the retirement allowance is composed of two parts. Since under the amendment a member of the retirement system and the city contribute equal amounts to the retirement fund it is clear that the first part of the formula refers to the total of the amounts so contributed by the member and the city (or twice the sum contributed by the member), plus accumulated interest, to be computed upon the basis of actuarial tables and rates approved by the retirement board. Actuarial tables, rates and valuations are provided for in section 9, p. 2325.

The second or "other part" of the formula is based on the member's service previous to July 1, 1935, commonly referred to as "prior service." With reference to such "other part" it is provided in subdivision (b) of section 14, as amended in 1935 (footnote 3), that the retiring member shall receive "the same percentage of his final compensation for each year of service rendered by him * * * prior to [July 1, 1935] as the [combined] contributions of the member and the city are calculated to provide upon retirement * * * at * * * sixty years of age * * *." "Final compensation," as heretofore stated, is the member's "average monthly compensation * * * during the ten years immediately preceding his retirement". Since the retiring member is to receive "one-half of his final compensation" which is based on his "average" monthly compensation for the next preceding 10 years (see subsection (d) of section 14, as amended in 1935, footnote 2), one half or 50 percent is employed as the basis of calculation. The percentage to be used for the purpose of determining the retirement allowance is calculated at the beginning of the member's membership in the retirement system by dividing 50 percent by the total number of years which the member will be required to serve in order to be eligible for retirement at the age of 60 years for a policeman. When the quotient resulting from such computation is multiplied by the number of years of the member's service prior to July 1, 1935, the product ensuing will represent the portion of the member's retirement allowance to which he is entitled by reason of such "prior service." This analysis of the method of computation provided in the charter may be illustrated by an example. If a member of the police department has had five years of service prior to July 1, 1935, and 15 years thereafter, and has attained the age of 60 years, he is eligible for retirement. The second or "other part" of his retirement allowance is computed in this manner: Fifty percent divided by 20 years of service will yield a quotient of 2.5 percent. Assuming the member's "final compensation" as above defined amounts to $300 a month, such sum multiplied by 2.5 percent will result in a product of $7.50. Multiplying that sum by the member's 5 years of prior service amounts to $37.50, which is the amount per month which the member will receive as the second or "other part" of his retirement allowance.

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[3] The pertinent part of subsection (b), 1935 amendment, reads:

"Upon retirement for service, a member shall receive a retirement allowance composed of the sum of two parts; one part being an amount derived by the application, upon the basis of tables and rates recommended by the actuary and approved by the Retirement Board, as provided in Section 9 of this Article, of twice the normal contributions plus accumulated interest thereon, made by him and standing to his credit under the Retirement System, at the date of his retirement, and the other part, regardless of his age at retirement, being the same percentage of his final compensation for each year of service rendered by him in the Fire or Police Department prior to the effective date hereof, as the contributions of the member and the city are calculated to provide upon retirement for service at fifty-seven years of age if he be a member of the Fire Department, or sixty years of age if he be a member of the Police Department, or upon completion of twenty years of service at an age higher than fifty-seven years if he is a member of the Fire Department or sixty years if he be a member of the Police Department, for each year of service after said date. * * *"

By an amendment to the charter approved by the Legislature in 1947 subsection (a)[4] of section 14 of article 6 was amended, Stats.1947, p. 3487, so as to give members of the retirement system the option of retiring at the age of 51 after having rendered at least 20 years of service but reducing the retirement allowance which he would have received if he had remained in the service until the normal retirement age has been reached—57 for firemen and 60 for policemen.

We find no ambiguity or uncertainty in this provision. If a member of the retirement system remains in service for the normal period he will receive a retirement allowance computed as hereinbefore described, but if he choses to retire at the age of 51 after 20 years of service his retirement allowance is proportionately decreased. If one member of the retirement system remains in service until he reaches the age of 60 and another retires at 51 it is assumed that the latter will draw his retirement allowance for a greater number of years than the former; hence the total amount of the monthly allowances received by the 60-year-old man with a shorter expectancy will be approximately equal to that of the 51-year-old member with a longer expectancy.

From the foregoing discussion it becomes patent that the provisions of the city charter here under consideration are not, as contended by appellant, so vague, uncertain and indefinite as not to be understandable or to be incapable of enforcement, nor do they leave to a ministerial officer the duty or power to define the rights of members of the retirement system. In order to provide a fair and equitable method of computing retirement allowances for policemen and firemen, having in view the fact that many of them had served in their respective departments prior to July 1, 1935, during which time the city was providing the entire amount of the retirement fund, and they, with those who came into service after that date, were required by the charter amendment of 1935 to contribute to the fund thereafter, it was essential to establish a formula that would apply justly to both groups. Those with so-called "prior service," not having contributed to the retirement fund previously to July 1, 1935, were of necessity treated in a manner that would be fair to them and not unfair to the members who came into the employment of the city after that date and were required to and did contribute to the fund from the beginning of their service. The fund is not depleted to the benefit of the older members and to the detriment of interests of the newer ones.

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[4] The applicable part of subsection (a), 1947 amendment, reads:

"Members of the Retirement System may retire for service at their option upon attaining age fifty-one but only after rendering at least twenty years of service. Upon such retirement, a member shall receive a retirement allowance calculated as provided in subsection (b) of this section, except that if a member retires before attaining age fifty-seven if he be a member of the Fire Department or age sixty if he be a member of the Police Department, that part of his retirement allowance provided because of service rendered prior to July 1, 1935, shall be reduced to that amount which the value at his retirement of such part of his retirement allowance deferred to age fifty-seven or sixty, depending on the respective department of which he is a member, will provide at his age at the time of such retirement. Any provision of subsection (b) of this section inconsistent with the sentence immediately preceding is hereby superseded for the purpose of interpreting said sentence."

[3–5] That there were difficulties in setting up such a formula is manifest, but if a practicable interpretation of the charter amendments can be found the court must adopt it and sustain the enactment. A statute will not be stricken down for uncertainty if a reasonable and usable construction can be given to its language and it will not be rendered nugatory by the fact that there may be difficulty in ascertaining its meaning or by the possibility of different interpretations. County of Tulare v. City of Dinuba, 188 Cal. 664, 677–678, 206 P. 983. All presumptions and intendments are in favor of the constitutionality of a statute and all doubts are resolved in favor of its validity and not against it. Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 636, 91 P.2d 577; People v. Southern Pac. Co., 209 Cal. 578, 593–594, 290 P. 25; County of Los Angeles v. Legg, 5 Cal.2d 349, 353, 55 P.2d 206; 16 C.J.S., Constitutional Law, § 98, p. 234; 12 C.J., p. 787, sec. 220.

[6] "A statute is not necessarily void because it is vague, indefinite, or uncertain * * * or because the intention of the legislature might have been expressed in plainer terms, * * * and opinions may differ in respect of what falls within its terms * * *. A statute will not be declared void for vagueness and uncertainty where the meaning thereof may be implied, * * *." 50 Am.Jur., pp. 489, 490, "Statutes," sec. 473.

[7] Not only are the charter provisions under discussion capable of clear and understandable construction but subsection (b) has been interpreted and administered by the appropriate authorities since 1935 and subsection (a) as it now reads since 1947. Such interpretation appears to have been satisfactory to the members of the retirement system since no previous attack has been made upon the validity of the provisions that are in question in this proceeding.

Since the 1935 and 1947 amendments are valid and at the time petitioner filed his application for retirement were in force and effect, superseding the amendments of 1919 pursuant to which petitioner had proceeded, respondents were correct in denying his application.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

36 Cal.2d 734

ORLOFF v. LOS ANGELES TURF CLUB, Inc., et al.

L. A. 20746.

Supreme Court of California, in Bank.

Feb. 14, 1951.

Rehearing Denied March 15, 1951.

Action by Morris Orloff against Los Angeles Turf Club, Inc., and others to enjoin defendants from refusing to admit plaintiff to racing arena. The Superior Court, Los Angeles County, Charles S. Burnell, J., entered a judgment denying injunctive relief and plaintiff appealed. The Supreme Court, Shenk, J., held that finding that plaintiff had reputation as a man of immoral character, etc., was not supported by the evidence and hence did not warrant denial of injunctive relief on ground that exclusion of plaintiff was justified.

Judgment reversed.

Prior opinion, 208 P.2d 987.

1. Administrative law and procedure 🔑385
Theaters and shows 🔑4

In so far as rules of State Horse Racing Board govern the licensee in exercising power to exclude persons from participation in the public entertainment afforded at race course, the rules may not be deemed to narrow the established right of participation by all persons on an equal basis. Civ.Code, §§ 51–54; Administrative Code, Tit. 4, § 1400 et seq.; Business and Professions Code, § 19561.

2. Administrative law and procedure 🔑387
Theaters and shows 🔑4

The State Horse Racing Board in exercising its rule-making power may not enlarge the instances in which the proprietor of a public race-course may lawfully place restraints on the rights of members of the public to attend races and participate in the wagering on the results thereof. Civ.Code, §§ 51–54; Administrative Code, Tit. 4, § 1400 et seq.; Business and Professions Code, § 19561.

3. Administrative law and procedure 🔑386
Theaters and shows 🔑4

State Horse Racing Board may make only such exceptions in the public right of equal participation in the public entertainment afforded at race-courses as are validly included in provision of Civil Code permitting proprietor of race-course to exclude any person who is intoxicated or guilty of boisterous conduct and persons of lewd or immoral character. Civ.Code, § 53; Administrative Code, Tit. 4, § 1400 et seq.; Business and Professions Code, § 19561.

4. Injunction 🔑128

In action to enjoin race track proprietor from excluding plaintiff from racing arena, evidence of past convictions of plaintiff of offenses pertaining to gambling and bookmaking, and purported evidence of plaintiff's reputation as a gambler were not relevant to any proper ground for exclusion of plaintiff. Civ.Code, §§ 51–54; Pen.Code, § 337a; Gen.Laws 1937, Act 3421, § 3.

5. Evidence 🔑322(1)

Testimony as to reputation by witnesses who had inquired of others and did not themselves know defendant's reputation, was incompetent as hearsay.

6. Evidence 🔑322(1)

Evidence of reputation may not be shown by witnesses conducting an inquiry, but must be given by persons having knowledge of the reputation in question.

7. Civil rights 🔑1

The civil rights statutes are declaratory of existing equal rights and provide the means for their preservation by placing restrictions upon the power of proprietors of places of public accommodation and amusement to deny the exercise of the right and by providing penalties for violation. Civ.Code, §§ 51–54.

8. Constitutional law 🔑211, 253

The exercise of the power to deny the right of all citizens to the full accommodations, facilities and privileges of places of public accommodation and amusement is a restraint on a personal right and is circumscribed by the same constitutional safeguards of equal protection of the laws and due process of law as are restraints under penal laws. Civ.Code, §§ 51–54.

9. Statutes 🔑47

The requirement that a law must be definite and its meaning ascertainable by those whose rights and duties are affected applies not only to penal statutes but to all laws governing fundamental rights and duties.

10. Theaters and shows ⚿4

Who is to be considered a person of immoral character within statute permitting exclusion of such persons from a place of public amusement is a matter of construction and application conformable to the legislative objective in providing the various standards for exclusion. Civ.Code, §§ 4, 53.

11. Theaters and shows ⚿4

The statute permitting exclusion of persons of immoral character from a place of public amusement does not contemplate a preliminary inquiry into the general moral character of an applicant for admittance. Civ.Code, §§ 4, 53.

12. Theaters and shows ⚿4

The general legislative objective in permitting exclusion of persons under the influence of liquor or guilty of boisterous conduct and persons of lewd or immoral character from places of public amusement was the protection of others on the premises and, as in other cases involving the exercise of the police power, reasonableness is the governing criterion. Civ.Code, §§ 4, 53.

13. Statutes ⚿47

The statute permitting exclusion of persons who are under the influence of liquor or guilty of boisterous conduct from places of public amusement is a reasonable exercise of police power on the basis of visible or readily ascertainable standards. Civ.Code, § 53.

14. Theaters and shows ⚿4

Commission of lewd, immoral or other acts inimical to the public safety or welfare, when applying for or after admittance to a place of public amusement, constitutes reasonable ground for exclusion under statute. Civ.Code, §§ 4, 53.

15. Theaters and shows ⚿4

The private business, personal relations with others, and past conduct, not on the premises, of a person applying for or admitted to a race course, regardless of whether such facts are relevant to indicate his character, are immaterial in the application of statute permitting exclusion of persons of immoral character from a place of public amusement. Civ.Code, § 53.

16. Theaters and shows ⚿4

Mere suspicion based on past conduct and alleged reputed activities, off race course, or on conversations held on the course with persons considered questionable, did not justify exclusion or ejection of a patron from race track, in absence of evidence that he had ever engaged in any illegal activities while on the premises. Civ.Code, §§ 51–54.

17. Injunction ⚿128

In action to enjoin race track proprietor from refusing to admit patrons to racing arena, finding that patron had a reputation as a man of immoral character, was a known undesirable and a person guilty of conduct detrimental to racing and the public welfare was not supported by the evidence and hence did not justify denial of injunctive relief on ground that exclusion of patron was justified. Civ.Code, §§ 51–54.

◆

William Katz, Los Angeles, for appellant.

Victor Ford Collins and Arnold M. Cannan, Los Angeles, for respondents.

Freston & Files, Los Angeles, amicus curiæ on behalf of respondents.

SHENK, Justice.

The plaintiff sought an injunction to restrain the defendant from refusing to admit him to the racing arena of Santa Anita Park. The complaint shows that on the 31st day of January, 1946, the plaintiff purchased a ticket and was admitted to the Park at 1:00 p. m. At 4:00 p. m. he was ejected. His ejection under similar circumstances occurred on February 2, 1946. Both occurrences were alleged to have been without cause or provocation on the plaintiff's part. The plaintiff has been refused admittance to the Park since his removal therefrom.

The case was before this court previously on an appeal wherein a judgment of dismissal, entered on an order sustaining the defendant's demurrer, was reversed. 30 Cal.2d 110, 180 P.2d 321, 171 A.L.R. 913. Upon the reversal a trial was had at the close of which the court made findings favorable to the defendant and entered judgment denying injunctive relief. The present appeal is from that judgment.

The issues involve the construction and application of sections 51–54 of the Civil Code. Section 51 provides that all citizens under state jurisdiction are entitled to the full accommodations, advantages, facilities and privileges of hotels, eating places, barber shops, theaters, conveyances, and other places of public accommodation and amusement subject only to the conditions and limitations established by law applicable alike to all citizens.

Section 53 provides that it is unlawful for the proprietor of any "opera-house, theater, melodeon, museum, circus, caravan, race-course, fair or other place of public amusement or entertainment, to refuse admittance to any person over the age of twenty-one years, who presents a ticket of admission acquired by purchase, or who tenders the price thereof for such ticket, and who demands admission to such place. Any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement." Sections 52 and 54 prescribe the liability of persons who deny such accommodations and privileges.

In substance the following evidence is relied on by the defendant to support the judgment. Between 1929 and 1939 the plaintiff was convicted in seven cases of various misdemeanors. Four of the convictions, form chart possession, were under an ordinance held to be invalid in Re Page, 1931, 19 Cal.App.2d 1, 298 P. 178. In 1929 he paid a $10 fine on a conviction of gambling. In 1935 he was convicted of bookmaking, Penal Code, § 337a, on a plea of guilty and received a suspended thirty day sentence and paid a $100 fine. In July 1939 he pleaded guilty to a charge of violation of section 3 of Act 3421, Deering's General Laws (Regulation and Licensing of Horse Racing) by the placing of a wager outside of the course, and paid a $50 fine. There is no evidence that any of the violations was committed on a race-course. There was no evidence that the plaintiff was drunk, boisterous, lewd or conducted himself in any but an orderly and proper manner. The track's arresting officer testified that he observed the plaintiff talking to persons who, by check with police files, were stated to have criminal records. The plaintiff conducts one or more restaurants. The testimony of two police officers was that they "investigated" the plaintiff's reputation, and that their investigation disclosed that he was reputed to be a bookmaker and doing a bookmaking business; that at the "present time" he was not known as a bookmaker but as a gambler, and that his place of business was known as a congregating place for professional gamblers and bookmakers.

The trial court did not find that the plaintiff was a person of immoral character. The finding is that he had a reputation as a man of immoral character, was a known undesirable, and a person guilty of conduct detrimental to racing and to the public welfare. This finding purported to justify the defendant's exclusion of the plaintiff from the race-course pursuant to rules formulated by the horse racing board regulating the application for and granting of licenses, the conduct of races, and other matters pertaining to the operation of race-courses where wagering is permitted. Calif.Adm.Code, Title 4, section 1400 et seq.; section 19561, Bus. & Prof. Code. The defendant relies on the following rules:

Rule 319 (sec. 1936), which provides that persons guilty of dishonest or corrupt practices, fraudulent acts or other conduct detrimental to racing shall be ruled off all racing enclosures, and stewards are required to exclude them; rule 320 (sec. 1937), which extends the exclusion to all recognized courses in the state; rule 354 (sec. 2009), which provides that an association shall not permit the making of hand-books on its grounds and if such practice is found to exist, the association shall take immediate steps to eliminate it under penalty of revocation of its license; and rule 355 (sec. 2010), which requires the association properly to police the grounds and to eject therefrom known undesirables, touts, persons under suspension or ruled off, persons of lewd or immoral character, and persons guilty of boisterous or disorderly conduct or other conduct detrimental to racing or the public welfare.

[1–3] There is here no quarrel with these rules insofar as they relate to the regulation of the licensee and its employees in the conduct of the races and of wagering on the results thereof. However, insofar as they govern the licensee in exercising the power of exclusion of persons from participation in the public entertainment afforded, they may not be deemed to narrow the established right of participation by all persons on an equal basis. The rule-making power of the board was upheld in Sandstrom v. California Horse Racing Board, 31 Cal.2d 401, 189 P.2d 17, 3 A.L.R.2d 90; but in exercising that power the board may not enlarge the instances when the proprietor of a public race-course may lawfully place restraints on the rights of members of the public to attend the races and participate in the wagering on the results thereof. Rules for proper policing of the course are required in the public interest; but the exercise of the power may not be made an occasion to extend discriminatory exclusion beyond that reasonably provided by the legislature in the exercise of the police power. The board may make only such exceptions in the public's right of equal participation as are validly included in the Civil Code. Boone v. Kingsbury, 206 Cal. 148, 161 et seq., 173 P. 797; California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 302–303, 140 P.2d 657, 147 A.L.R. 1028; Whitcomb Hotel, Inc., v. California Employment Comm., 24 Cal.2d 753, 757, 151 P.2d 233, 155 A.L.R. 405 and additional cases cited.

We may assume that the defendant would have been justified in ejecting and refusing admittance to the plaintiff had there been evidence of his making book on the race-course. It would not be questioned that such violation of law would constitute conduct justifying the action and would be within the compass of the power to police the premises under the Code and the rules. But there is no such evidence here, and its absence has compelled the defendant to rely on the asserted sufficiency of the evidence to support a conclusion that the plaintiff was a person of immoral character justifying the action in excluding him from the course.

There is thus brought into focus the question of what immorality will warrant the action taken. In this connection the plaintiff contends that section 53 of the Civil Code is unconstitutional in providing for exclusion on the basis of "immoral character" because that phrase provides no definite standard; that the term "immoral character" is too vague and uncertain to apply as a standard or guide; that in any event the evidence of specific acts committed outside the course more than six years previously and the purported evidence of reputation are too remote as proof of immoral character.

[4–6] It is unnecessary here to determine when evidence of specific acts or when evidence of reputation may be received as tending to prove character. See Wigmore on Evidence, 3rd Ed., Vol. 1, p. 689 et seq.; see also Cosgrove v. Pitman, 103 Cal. 268, 275, 37 P. 232; People v. Ridgeway, 89 Cal.App. 615, 618, 265 P. 349. The trial court admitted both types of evidence, namely that of past convictions of offenses pertaining to gambling and bookmaking, and purported evidence of the plaintiff's reputation. For reasons hereinafter appearing we conclude that the evidence of conduct was not relevant to any proper ground for the defendant's refusal to admit him to the arena. For similar reasons the evidence of the plaintiff's reputation had no relation to a proper ground for his exclusion from the course. Furthermore, the evidence received as bearing on the question of reputation was incompetent as hearsay and the court should have sustained the plaintiff's objection on that ground. The testimony was not given by persons who knew the defendant's reputation, but by witnesses who inquired of others as to the defendant's reputation. The rule is that evidence of reputation when relevant may not be shown by witnesses conducting an inquiry, but must be given by persons having knowledge thereof. Tingley v. Times-Mirror Co., 151 Cal. 1, 26–27, 89 P. 1097 and cases cited.

[7] The so-called civil rights statutes, sections 51–54 Civil Code, do not necessarily grant theretofore non-existent rights or freedoms. The enactments are declaratory of existing equal rights and provide the means for their preservation by placing restrictions upon the power of proprietors to deny the exercise of the right and by providing penalties for violation. In Greenberg v. Western Turf Ass'n, 140 Cal. 357, 361, 73 P. 1050; Id., 148 Cal. 126, 128, 82 P. 684, affirmed 204 U.S. 359, 360, 27 S.Ct. 384, 51 L.Ed. 520, this court spoke of the predecessor of the present statute, Stats. 1893, p. 220, as a regulation of places of amusement in the exercise of the police power. In affirming the determination as to the validity of the statute, the United States Supreme Court, 204 U.S. at page 364, 27 S.Ct. 384, stated that the racecourse, being a place of public entertainment, was so far affected with a public interest that the State might, in the interest of good order and fair dealing, require the proprietor to recognize its own tickets of admission.

[8, 9] Under our institutions the freedom to pursue the declared right on an equal basis is just as precious as many other freedoms and rights. The exercise of the power of its denial, being a restraint on a personal right, is circumscribed by the same constitutional safeguards of equal protection and due process as are restraints under penal laws. The requirement that a law be definite and its meaning ascertainable by those whose rights and duties are affected applies not only to penal statutes but to all laws governing fundamental rights and duties. Ex parte Stewart, 24 Cal.2d 344, 149 P.2d 689, applied to a judgment; In re Leach, 215 Cal. 536, 544, 12 P.2d 3, applied to a statute governing the sale of securities; In re Peppers, 189 Cal. 682, 209 P. 896, applied to a statute governing shipments of oranges. A statute not sufficiently certain is repugnant to the due process clause. Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888. The plaintiff is thus a person entitled to know by reasonably definite standards when the right here involved may lawfully be withheld.

The term "immoral" has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as wilful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare. 20 Words & Phrases, pp. 159–160.

[10, 11] The legislature did not specify who was to be considered a person of immoral character. Failure of greater specification where restraints on the exercise of fundamental rights are involved, as indicated, may be fatal to the application of the statutory standard or guide. But the omission in the present statute is not fatal to any use of the standard of immorality as a guide. Here it becomes a matter of construction and application conformable to the legislative objective in providing the various standards. In pursuing the investigation into the legislative objective, Civ. Code, sec. 4, it is observed that there is no procedure provided for an inquiry into good moral character as a preliminary to the exercise of the declared right. A preliminary inquiry into the general moral character of an applicant for admittance to a public place of amusement, even if feasable, could not have been intended. Cases involving the method of ascertaining the good moral character required of an applicant for a privilege, such as the license to operate the race-course, are inapplicable.

[12–15] In providing the standards to guide proprietors in placing restraints on the exercise of the personal right here involved the legislature was undoubtedly concerned with the safety and welfare of the attending public. The general objective was the protection of others on the premises. As in other matters involving the exercise of the police power, reasonableness is the governing criterion. The statute justifies the denial of the declared right to persons under the influence of liquor and to persons engaging in boisterous conduct. Such conditions ordinarily are obvious. In these respects the standards do not suggest an inquiry beyond visible or readily ascertainable aspects and exclusion on those grounds is reasonable. Similarly reasonable as a ground of exclusion is the commission when applying for or after admittance, of lewd, immoral, or other acts inimical to the public safety or welfare. A determination concerning the then commission of such acts is likewise made from visible and obvious factors. But the private business, the personal relations with others, the past conduct not on the premises, of a person applying for or admitted to the course, whether or not relevant to indicate his character, are immaterial in the application of the statutory standards under the facts of this case.

[16] It may be assumed that the plaintiff might be suspected of illegal gambling activities off the race-course. The defendant would be justified in taking reasonable precautions to prevent opportunities for the commission of criminal activities on the course. Here, however, there is no evidence whatsoever, and it is not suggested, that the plaintiff while on the course was or ever had engaged in illegal activities or in an attempt to commit a crime. Under any proper construction and application of the statutory guides, mere suspicion based on past conduct and alleged reputed activities off the course, or on conversations without disclosure of their substance held on the course with persons considered questionable, did not justify the ejection or exclusion of the plaintiff.

Therefore, contrary to the suggestion of amici curiae as to a proper ground for denying injunctive relief, it was not the legislative intent to vest authority in the proprietor to determine primarily and in every instance what persons or classes of persons should be deemed sufficiently moral to be admitted to the course and thus be permitted to engage in lawful gambling. It could not have been intended that the proprietor should be confronted with the impossible task of determining who among its patrons were sufficiently moral to be permitted to attend and there to engage in lawful on-track gambling and who were sufficiently immoral because of suspected unlawful off-track gambling to justify exclusion from the course. As indicated it is a person's conduct when entering and attending a public place covered by the sections to which the statutory standards apply. It was neither necessary nor reasonable to go further in order to attain the legislative objective in furnishing the prescribed guides, and it must be concluded that such was the intended extent of their application. A contrary conclusion would be a denial of equal protection and due process. See also State v. Truby, 211 La. 178, 29 So.2d 758; State v. Vallery, 212 La. 1095, 34 So.2d 329.

[17] The foregoing is not intended to foreclose inquiry into the question whether a person justifiably ejected from a race-course may thereafter be excluded from the same and other courses. Exceptional cases are to be determined on their own facts. On the present record the evidence does not support the findings or the judgment.

The judgment is reversed.

GIBSON, C. J., and CARTER, TRAYNOR, and SCHAUER, JJ., concur.

SPENCE, Justice.

I concur in the reversal of the judgment, as I am of the view that under a proper construction of the statute before us, the evidence was insufficient to justify the exclusion of plaintiff from the race-track. I also agree with the conclusion of the majority opinion that the rights of the parties must be determined under the statute rather than under the rules, as the board had no power by rule to provide for the exclusion of members of the public upon grounds other than those provided in the statute. I cannot, however, subscribe to the construction placed upon the statute in the majority opinion, for, in my opinion, such construction alters the meaning of the statute and defeats the legislative intent and purpose.

A reading of section 53 of the Civil Code shows that it is applicable not only to a "race-course" but also to any "theater, melodeon, museum, circus, * * * fair or other place of public amusement or entertainment". By its terms, it permits the proprietor to exclude from any such place only certain persons, including a "person of lewd or immoral character". The intent and purpose of such permissible exclusion seems clear. As stated in the majority opinion, "the legislature was undoubtedly concerned with the safety and welfare of the attending public", and the "general objective was the protection of others on the premises." It is a matter of common knowledge that many of such places of public amusement and entertainment are heavily patronized by young men and women, as well as by small children, and that the records of our courts abound with the criminal prosecutions of sex-offenders, in which it appears that their initial advances upon their victims were made in such places. These considerations were unquestionably in the minds of the legislators when enacting said section 53, and it seems obvious that it was the intent and purpose of the legislature, in including the phrase in question, to permit the proprietor of any such place to exclude from admission known sex-offenders, including sexual perverts, to the end that other patrons would not be molested by the advances of such undesirables.

As I read the majority opinion, it would deny to the proprietor of such an establishment permission to exclude any known sex-offender unless and until such person might be actually caught in the commission of a lewd or immoral act on the premises. So it is said that "past conduct not on the premises * * * whether or not relevant to indicate his character" is "immaterial," and it is indicated that the only material consideration is the "person's conduct when entering and attending" the place of public amusement or entertainment. Thus, the effect of the majority opinion is to rewrite the phrase permitting the exclusion of a "person of lewd or immoral character" to permit the exclusion only of a "person guilty of lewd or immoral conduct at the place of public amusement or entertainment." This constitutes a complete emasculation, rather than a construction, of the phrase under consideration. Furthermore, it renders the phrase practically meaningless and without purpose, as there are numerous statutes prohibiting lewd and immoral acts under which a person committing such acts at a place of public amusement might be arrested and summarily ejected from such place. It thus appears that the salutary purpose of the phrase under consideration is defeated by the construction placed upon it in the majority opinion.

The question remains as to whether such phrase can be otherwise construed so as to withstand the attack made upon it because of its claimed uncertainty. In my opinion, it can and, as hereinafter construed, no valid constitutional objection can be interposed.

It must be remembered that, contrary to the implications in the majority opinion, the source of plaintiff's right, or the right of any person, to be admitted to a place of public amusement rests solely in the statutes under consideration. No such right is accorded by the Constitution, and no such right existed at common-law. Finnesey v. Seattle Baseball Club, 122 Wash. 276, 210 P. 679, 30 A.L.R. 948; annotations 30 A.L.R. 951, 60 A.L.R. 1089; also, Greenberg v. Western Turf Ass'n, 140 Cal. 357, 73 P. 1050, Id., 148 Cal. 126, 82 P. 684. The statement in the majority opinion that "The enactments are declaratory of existing equal rights * * *" is not supported by the citation of a single authority. On the contrary, the right of any person to admission to such places is measured entirely by the terms of such statutes, and it is the duty of this court to place a reasonable and workable construction upon the statutory limitations affecting such right, if such construction is possible.

It may be freely conceded, as indicated in the majority opinion, that the word "immoral," when standing alone, has "no fixed and well defined meanings," and that it "might mean anything and might have different meanings in the minds of different people", State v. Truby, 1947, 211 La. 178, 29 So.2d 758, 760, so that its use alone would create no "certain or understandable rule." State v. Vallery, 1948, 212 La. 1095, 34 So.2d 329, 331. But if, as assumed in the majority opinion, the word "immoral" is objectionable here because of its uncertainty, it is equally objectionable as a description of conduct as it is as a description of character. In passing, it appears appropriate to suggest that there are numerous persons whose concepts of morality are such that, according to their standards, any person who makes a practice of attending race-courses for the purpose of engaging in pari-mutuel betting, and, *a fortiori,* any person who makes a business of conducting for profit such pari-mutuel betting or any other gambling enterprise, is a person of "immoral character." It seems certain that those engaged in the conduct of race-courses would be the last to suggest that the legislature intended to adopt, or that any court or jury should apply, such a high standard; and yet the question remains as to where the line can be drawn in the determination of who is and who is not a "person of lewd or immoral character" within the meaning of the statute, unless it be drawn as herein indicated.

The vice of the majority opinion lies in its consideration of the word "immoral" alone and out of context. Here the statute authorizes the exclusion of a "person of lewd or immoral character". The descriptive qualification appears as an integrated limitation, with the association of wording indicative of the legislature's intent that the word "immoral" partake of the same connotation in meaning as the word "lewd," one in juxtaposition with the other in completing the phrase. The word "lewd" has been defined by lexicographers to mean "given to the unlawful indulgence of lust; eager for sexual indulgence", United States v. Bebout, D.C., 28 F. 522, 524; Jamison v. State, 117 Tenn. 58, 94 S.W. 675, 678; "lascivious; lecherous; tending to excite lustful thoughts", Ledbetter v. State, 184 Tenn. 396, 199 S.W.2d 112, 114. Accordingly, the term "immoral character" as used in the same phrase would signify its meaning as focused upon character with respect to six infractions. The fact that the connection between the related words is in the disjunctive rather than in the conjunctive does not militate against their interpretation by reason of association, when necessary to effectuate the legislative intent. 23 Cal.Jur. § 115, p. 737; In re Sekuguchi, 123 Cal.App. 537, 538, 11 P.2d 655. Under the rule of *noscitur a sociis* the meaning of a word takes color and expression from the purport of the entire phrase of which it is a part, and it must be construed so as to harmonize with the context as a whole. 50 Am.Jur. § 247, p. 241; 23 Cal.Jur. § 129, p. 755; United States v. Lewis, 7 Cir., 110 F.2d 460, 462; Vilardo v. County of Sacramento, 54 Cal.App.2d 413, 420, 129 P.2d 165. So pertinent is the observation of Mr. Justice Holmes when he said, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372.

As so restricted in meaning to its relation to sex infractions, the term "immoral character" furnishes a sufficiently definite description setting up authorized standards for the exclusion of persons from places of public amusement. In the interpretation of statutes, a construction that "leads to uncertainty or confusion" and would be "productive of * * * insecurity" will be avoided in favor of a construction that will "afford a fixed, permanent and certain rule to ascertain whether a particular case is included within or excluded from the operation of the statute." 50 Am.Jur. § 382, p. 394. So here, by confining the concept of the word "immoral" to coordinate with the measure of sex considerations inherent in the word "lewd," the entire phrase," person of lewd or immoral character," is given a sufficient precision in meaning and rendered unobjectionable on the premise of being vague and indefinite according to recognized standards of conduct. United States v. Lewis, supra, 110 F.2d 460, 462.

I therefore agree that the judgment must be reversed because of the absence of any evidence whatever to show that plaintiff was a "person of lewd or immoral character" as that phrase has been here construed. I cannot join, however, in the declarations of the majority opinion which construe the statute so as to deny to the proprietor of a place of public amusement the right to exclude from his premises objectionable sex-offenders, as to whom the phrase under consideration was clearly intended to apply.

EDMONDS, J., concurs.

Rehearing denied; EDMONDS and SPENCE, JJ., dissenting.

OWEN v. OFF et al.

L. A. 21617.

Supreme Court of California, in Bank.

Feb. 20, 1951.

Rehearing Denied March 15, 1951.

Action by Le Roy D. Owen against Edward T. Off, individually and as executor of the last will of Katherine S. Off, deceased, and another to recover commission for sale of securities. The Superior Court, Los Angeles County, Arnold Praeger, J., entered a judgment for defendants and plaintiff appealed. The Supreme Court, Shenk, J., held that where plaintiff was a person employed by defendants for compensation to sell or negotiate for the sale of stock, plaintiff was an agent within meaning of Corporate Securities Act and was required to procure a license before he could maintain an action to recover commission for sale of securities, even though sale in question was an isolated single transaction.

Affirmed.

Carter, Edmonds and Schauer, JJ., dissented.

See prior opinion, Cal.App., 218 P.2d 563.

1. Licenses ⚷39.1

Generally when a statute enacted for protection of the public requires a license for the doing of certain acts and imposes a penalty for violation, a contract to perform such acts entered into by an unlicensed person is illegal and will not be enforced.

2. Licenses ⚷18½(4, 8)

Provisions of the Corporate Securities Act that the act should not apply to the sale of any securities made by or on behalf of vendor not the issuer or underwriter thereof who is the bona fide owner of such security, only released individuals or companies from obtaining broker's or agent's license when making sales of their own stock without such agency, and did not release a compensated agent or person acting as a broker for such a company. Corporations Code, §§ 25150 to 25152.

3. Brokers ⚷42
Licenses ⚷39.14

Where plaintiff was a person employed by defendants for compensation to sell or negotiate for the sale of defendants' stock, plaintiff was an agent within meaning of Corporate Securities Act and was required to procure a license before he could maintain an action to recover the commission for the sale of securities even though sale in question was an isolated single transaction. Business and Professions Code, §§ 10130 et seq., 10134; Corporations Code, §§ 25000 et seq., 25006, 25150 to 25152.

4. Licenses ⚷18½(26)

Where services rendered have been deemed to be those defined within the Corporate Securities Act, a single transaction could not legally be conducted without first obtaining the required permit. Business and Professions Code, §§ 10130 et seq., 10134; Corporations Code, §§ 25000 et seq., 25006, 25150 to 25152.

Morrow & Trippet and F. B. Yoakum, Jr., all of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, Ira C. Powers and Sherman Welpton, Jr., all of Los Angeles, for respondents.

Fred N. Howser, Atty. Gen., T. A. Westphal, Jr., Deputy Atty. Gen., Heller, Ehrman, White & McAuliffe, San Francisco, Adams, Duque, Davis & Hazeltine, Los Angeles, B. J. Feigenbaum, Orrick, Dahlquist, Neff & Herrington, all of San Francisco, amici curiae on behalf of respondents.

SHENK, Justice.

In an action to recover a commission for the sale of certain securities on behalf of the defendants summary judgment was entered in their favor. The plaintiff appealed.

It is alleged in the complaint that the defendants had engaged the plaintiff to find a purchaser for and to sell, or effect the sale of, their 1275 shares of stock in the Figueroa Building Corporation, and had agreed to pay him a specified commission; that through the plaintiff's efforts a sale of the stock was effected to the Greene-Haldeman Company, but that no commission was paid. In the defendants' answer it is admitted that the plaintiff was engaged to endeavor to sell the stock owned by them. It is also alleged that an offer for the purchase of their stock had been submitted to the defendants by the plaintiff on behalf of the Greene-Haldeman Company, that the offer was refused, and that a later offer by the same company was accepted as a result of independent negotiations after the agreement with the plaintiff had expired.

The defendants' motion for summary judgment was based on their attorney's affidavit which disclosed the plaintiff's admission by deposition that he was not licensed as a broker or agent under the Corporate Securities Act. An amended answer was filed in which this fact was alleged as an additional defense on the theory that the agreement was illegal and therefore unenforceable.

In a counter affidavit on the motion the plaintiff did not deny the defendants' averments but stated that he was a duly licensed real estate broker; that in 1944 he was employed to sell the Figueroa Street Building but before he could find a purchaser it was decided for tax purposes to sell the stock in the Figueroa Building Corporation which owned the real property; that the defendants owned approximately 91 per cent of the stock; that on March 5, 1945, he was employed to sell the stock; that about May 16, 1946, he found a "purchaser ready, willing and able to purchase" the stock; that the sale was "a single and isolated transaction" insofar as the plaintiff was concerned since he was a real estate broker and not engaged in sales of stock or other types of securities; and that the sale of the stock was to be made by him "on behalf of" the defendants, who were the bona fide owners thereof.

The summary judgment for the defendants was based on the foregoing facts appearing from the pleadings and affidavits.

[1] The plaintiff does not challenge the general rule that when a statute enacted for the protection of the public requires a license for the doing of certain acts and imposes a penalty for violation, a contract to perform such acts entered into by an unlicensed person is illegal and will not be enforced. He contends that he was not required to be licensed to engage in the transaction involved.

When the events took place, the Corporate Securities Act of 1917 (Stats.1917, p. 673) as amended (Deering's General Laws, 1943, Vol. 2, Act 3814), was in effect. The licensing requirement is found in section 6 (now sec. 25700 Corporations Code) which states: "No person or company shall act as an agent or broker until such person or company shall have first applied for and secured from the commissioner [of corporations] a certificate, then in effect, authorizing such person or company so to do. * * *" Section 2(a) (now sections 25005–25006 Corp.Code), defines "agent" and "broker." By Section 2(a) 9 the word "agent" includes every person or company employed or appointed by a company or broker or any other person, who either as an employee or otherwise, for a compensation, sells, offers for sale, negotiates for the sale of or takes subscriptions for any security. Section 2(a) 10 defines the word "broker" as every person or company, other than an agent, who engages in the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in any security issued by others.

The plaintiff contends that neither an agent nor a broker is required to be licensed to effect sales of securities "on behalf of" the owner. He relies on the following language of section 2(c) (now secs. 25150–25152 Corp.Code):

"Except as herein expressly provided, the provisions of this act shall not apply to the sale of any security in any of the following transactions:

"1. [Judicial sales]

"2. [Sales by pledgees or mortgagees]

"3. The sale of securities when made by or on behalf of a vendor not the issuer or underwriter thereof who, being the bona-fide owner of such securities, disposes of his own property for his own account * * *."

It is argued that the introductory phrase in that section, "Except as herein expressly provided" does not refer to the remainder of the act, but is confined to section 2 in which it appears. The meaning of the term "herein" is determined by the context of the statute in which it is used. See In re Pearsons' Estate, 98 Cal. 603, 608, 33 P. 451. Here it is clear that the word refers to the entire act. If the reference were to section 2, the language would be meaningless since no exceptions appear in that section. The all-embracing application is compelled by the manifest purpose of the act which discloses a comprehensive scheme for controlling the issuance and sale of corporate securities. It is also indicated in the codification of section 2(c). In rephrasing the section for inclusion in the Corporations Code there is substituted for the words "Except as herein expressly provided", the phrase: "Except as expressly provided in this division". The reference is to Division 1, Title 4 of the Corporations Code (secs. 25000–26104; Stats. 1949, ch. 384, p. 698), which comprises all of the Corporate Securities Act. It is therefore significant that the intended application of the word "herein" in section 2(c) is likewise to the entire act.

[2] It is not questioned that the defendants were the bona fide owners of the stock. It is the plaintiff's contention that since by section 2(c) 3 the provisions of the act are inapplicable to a sale "on behalf of" such owners the licensing provisions do not apply to agents or brokers negotiating such sales. The statement is obviously a non-sequitur when the proper effect is given to the exception in section 2(c). Since the language of exception embraces a reference to the entire act, it becomes a matter of emphasis that other provisions of the act were to remain effective. Especially it is apparent that the language did not release requirements for the licensing of a person employed as a compensated agent or as a broker to sell stock for an owner. Not all sales are of original issues, but a large proportion of those conducted on the stock exchange and privately are sales of owners' stock. To apply the language as here invoked would be to place obstructions in the application of the salutary provisions of the act and defeat in large part the legislative objective in enacting requirements for the licensing of agents and brokers. It must therefore be concluded that the language of section 2(c), insofar as material here, releases individuals or companies from obtaining a broker's or agent's license when making sales of their own stock without such agency. It cannot be deemed to release a compensated agent or a person acting as a broker from conforming with the statutory requirements.

It is also urged that the plaintiff, in the conduct of a single or isolated transaction should not be deemed to be subject to the licensing requirements. Reliance is on section 2(a)10 defining a broker as one who engages in the "business" of selling securities; on a general rule that an isolated transaction by one acting as a broker will not prevent recovery of the commission, 30 A.L.R. 858; 42 A.L.R. 1230; 118 A.L.R. 657; and on the omission from the Corporate Securities Act of a provision similar to that in the Real Estate Act (Sec. 10134 Bus. & Prof.Code) which expressly subjects to the licensing provisions a person who for compensation conducts a single transaction.

[3] It may be assumed, as insisted by the plaintiff, that he was not in the business of selling securities and that he did not act in the capacity of a broker as defined in the Corporate Securities Act. However, it is incontrovertible that he was employed by the defendants for compensation to sell their stock. The Corporate Securities Act requires the licensing of all such compensated agents. It does not admit of an ex-

ception as to a transaction by a person who has been employed for compensation to sell stock. On the other hand the Real Estate Act provides for the licensing of brokers and of salesmen who are employed by brokers, and exempts certain designated services and persons. (Secs. 10130 et seq. Bus. & Prof.Code.) The cases collected in the Notes hereinabove cited to support the general rule invoked deal in the main with real estate transfers. It may well be that, because of such a rule and lest an agent, as distinguished from a broker or salesman, be deemed excluded when acting in a single, although compensated, transaction the legislature inserted in the Real Estate Act the express inclusion of a single transaction not otherwise exempted. But it does not follow that the omission in the Corporate Securities Act indicated a contrary intent as to a single transaction in the case of stock sales. It could also be argued that the legislature deemed the matter covered without the necessity of more express language than the definitions of brokers and agents in connection with the licensing requirements. This is more persuasive since as stated the language expressly covers all compensated agents. The policy and purpose of protection to the public which underlies the enactment precludes exceptions neither expressly included nor plainly implied. The plaintiff admittedly was a person employed by the defendants for compensation to sell or negotiate for the sale of the stock. He was therefore an agent as defined by the act and was required to procure a license.

Cases in this state relied on do not establish exceptions as to single transactions under the Corporate Securities Act. The services performed by the plaintiff in McKenna v. Edwards, 19 Cal.App.2d 327, 65 P.2d 810, were held not of the character covered by the provisions of the act. Similarly in Dougherty v. Cross, 65 Cal.App.2d 687, 151 P.2d 654, the court held that the services contemplated by the agreement were by way of financial assistance, that personal stock sales by the plaintiff were not within the agreement and so recognized by the parties, and that the compensation called for by the agreement could be recovered.

[4] On the other hand, where the services have been deemed within those defined by the act, it has been held that a single transaction could not legally be conducted without first obtaining the required permit. Van Wyke v. Burrows, 98 Cal.App. 415, 277 P. 190; Rhode v. Bartholomew, 94 Cal.App.2d 272, 210 P.2d 768. In this connection, except in regard to singleness, there is no contention that the nature of the services performed by the plaintiff, or of the agreement as to compensation, placed the matter beyond the purview of the act.

From the foregoing it is concluded that the plaintiff could not have acted legally as agent of the defendants without a license from the corporation commissioner whether the transaction was single or otherwise. Since the parties' contract purported to compensate him for his services as an agent in the sale of the stock, it was unenforceable.

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

It is conceded that plaintiff's negotiation for the sale of the stock was a single and isolated transaction; that he was not engaged in the business of selling stock. The almost universal rule is that a license is not required under broker licensing acts for such a transaction, unless it is expressly included in the act; and therefore lack of a license does not bar recovery of a commission. See cases cited 30 A.L.R. 858; 42 A.L.R. 1230; 118 A.L.R. 657; 169 A.L.R. 783; 12 C.J.S., Brokers, § 67, p. 156. And that rule has been recognized in this state. In Haas v. Greenwald, 196 Cal. 236, 237 P. 38, 59 A.L.R. 1493, a sale of real estate was involved, thus invoking the real estate brokers act. The isolated transaction exception rule was urged, but the act expressly included such transactions, and, therefore, recovery of a commission was not allowed. But, the court stated, after referring to the isolated transaction rule, 196 Cal. at page 244, 237 P. at page 41: "This argument, with the authorities which are cited in support of it, might have *some cogency but for the express and unmistakable terms of the statute to the contrary.* * * * The authorities cited in support of the appellant's position in this regard do not sustain it for the reason, as is well illustrated by the case of Miller v. Stevens, 224 Mich. 626, 195 N.W. 481, mainly relied upon by appellant, that the statute under review in said decision *omitted this very provision* which our statute contains, rendering a single act of the character defined, for a compensation, sufficient to constitute the person performing it a real estate broker." (Emphasis added)

The majority opinion flies squarely in the face of this rule for nowhere does the broker's license law expressly make it applicable to a single, isolated transaction. On the contrary, from the act, the implication clearly excludes isolated deals, for, as stated in the majority opinion, sales made on behalf of a bona fide vendor of his own stock are exempted from the act. Stats. 1917, p. 673, § 2(c).

For the reason above stated, I would reverse the judgment.

EDMONDS and SCHAUER, JJ., concur.

Rehearing denied; EDMONDS, CARTER, and SCHAUER, JJ., dissenting.

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102 Cal.App.2d 320

PEOPLE v. EVANS.

Cr. 695.

District Court of Appeal, Fourth District, California.

Feb. 15, 1951.

Charles W. Evans was convicted in the Superior Court of Riverside County, O. K. Morton, J., for forgery and the issuance of a check without sufficient funds, and the defendant appealed. The District Court of Appeal, Griffin, J., held that where the record showed that defendant freely chose to proceed to trial without the aid of counsel, the unverified statement in his brief that he was denied the privilege of counsel by reason of some claimed false inducement, not disclosed by the record, was insufficient to present that question for consideration on appeal.

Affirmed.

1. Criminal law 🔑1036(13)

In forgery prosecution, where the record failed to disclose an alleged order denying the motion for a new trial, attempted appeal from order would be dismissed. Pen.Code, §§ 470, 476a.

2. Criminal law 🔑1028

On an appeal from a judgment, matters raised in the brief, which appear to be merely unsworn statements of the defendant as to certain purported facts in the case, which purported facts were not before presented to the trial court for consideration, cannot be considered.

3. Criminal law 🔑1028

Courts of review may only pass upon questions properly raised at the trial.

4. Criminal law 🔑1119(1)

In forgery prosecution, where the matter of obtaining counsel for defendant was fairly presented to him, and the record showed that he chose to proceed without the aid of counsel, unverified statement in defendant's brief that he was denied privilege of counsel by reason of some claimed false inducement, not disclosed by record, was insufficient to present question for consideration on appeal. Pen.Code, §§ 470, 476a.

5. Criminal law 🔑1044

In forgery prosecution, where defendant failed to move to set aside the information and to enter a different plea than that of guilty, either before or after pronouncement of judgment, the District Court of Appeal was in no position to disturb the judgment of the trial court. Pen.Code, §§ 470, 476a.

Charles W. Evans, in pro. per.

Fred N. Howser, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant pleaded guilty to counts in an information numbered one to seven, inclusive, charging a violation of section 470 of the Penal Code, and counts eight to ten inclusive, charging a violation of section 476a of the Penal Code. He was sentenced to State Prison, sentence to run concurrently on all counts excepting count six, which was to run consecutively with count five.

Defendant was apprehended in Oklahoma. The record shows that when arraigned for plea, he was asked if he was represented by an attorney and if he desired the court to appoint an attorney for him. After some discussion he stated he would like to have one, but if the court would "turn it over to the probation officer right" now, he "would like it that way" and he would "proceed without an attorney". After the reading of each count of the information in detail he was asked if he pleaded guilty or not guilty. To each count he entered a plea of guilty. Subsequently, the probation officer's report was received which indicated that defendant had passed several checks in Oklahoma and that the authorities there had a "hold" on him. Defendant endeavored to make partial restitution of those checks so the "hold" would be released. He consulted an attorney who advised him to "go ahead and take sentence" and "he would help me later on" with the Oklahoma charges.

[1] After consideration of the Probation Officer's report defendant was duly arraigned for judgment. He expressed a desire to pay off the checks involved, which offer was not considered. Defendant made no further request for the appointment of counsel. Probation was denied. The defendant stated in open court that he had no legal cause to show why judgment should not be pronounced. Judgment was accordingly pronounced. Defendant appealed from the judgment and from a purported order denying a motion for new trial. Since there is no record of any such motion or order the attempted appeal therefrom must be dismissed.

[2] The main argument presented on this appeal is that defendant entered a plea of guilty to the charges because of alleged statements made by an officer who returned him from Oklahoma, which statements he said were threatening and amounted to a promise by the officer that if defendant would plead guilty he would receive only a county jail sentence. No mention was made in the trial court of this charge. The first time this claim is made is in defendant's opening brief, which is unverified. On appeal from a judgment, matters raised in the brief, which appear to be merely unsworn statements of the defendant as to certain purported facts in the case, which purported facts were not before presented to the trial court for consideration, cannot be considered on appeal. People v. Gilpin, 38 Cal.App.2d 24, 26, 100 P.2d 356.

[3] The next argument is subject to the same disposition. Defendant, in his brief, makes certain vague claims about his being "forced" to protect another "party" or "partner in crime". He complains because the prosecution failed to call in this other "party", and that accordingly the defendant was prejudiced because the testimony of such person would have caused the trial court to "release" defendant, citing Sec. 31, Penal Code. Defendant therein failed to name such "partner in crime". Apparently the prosecution had no previous knowledge of such a "partner". Just why the production of such "partner" would have vindicated defendant is not shown. Courts of review may only pass upon questions properly raised at the trial. People v. Abila, 137 Cal.App. 26, 29, 29 P.2d 796.

[4] The last contention is that defendant was permitted to enter a plea of guilty without assistance of counsel and was accordingly denied "due process of law". A recitation of the facts disclosed by the record does not show that defendant was denied a right to counsel or a right to have counsel appointed for him. The matter of obtaining counsel for defendant was fairly presented to him, and according to the only record before us he freely chose to proceed without the aid of counsel. The unverified statement in defendant's brief that he was denied the privilege of counsel

by reason of some claimed false inducement, not disclosed by the record, is insufficient to present that question for consideration on appeal from the judgment. People v. Taminago, 35 Cal.App. 238, 240, 169 P. 696.

[5] Defendant failed to move to set aside the information and to enter a different plea, either before or after pronouncement of judgment. Under the record before us this court is in no position to disturb the judgment of the trial court.

The attempted appeal from the order denying a new trial is dismissed. Judgment affirmed.

BARNARD, P. J., and MUSSELL. J., concur.

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102 Cal.App.2d Supp. 943

DIVISION OF LABOR LAW ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS v. MAYFAIR MARKETS.

No. 162588.

Appellate Department, Superior Court,
San Diego County, California.
Feb. 14, 1951.

Action by the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, against Mayfair Markets, a California corporation, on behalf of plaintiff's assignor for one week's vacation pay alleged to be due its assignor from defendant employer. The Municipal Court, City of San Diego, Lowell Howe, J., rendered judgment for defendant and plaintiff appeared. The Superior Court, Glen, J., held that where under collective bargaining agreement employee was entitled to one week's vacation after 12 consecutive months employment, but employment was terminated by sale of business when employee had been employed only 10 months, plaintiff was not entitled to recover vacation pay as claimed for its assignor.

Judgment affirmed.

1. Appeal and error ⚷931(3)

Where appeal is on judgment roll and findings were waived, appellate court must presume that trial court found all facts necessary to support judgment and that evidence was sufficient to support judgment.

2. Appeal and error ⚷1008(3)

Where construction of contract is submitted to trial court by parties and evidence in aid of interpretation thereof is received, trial court's interpretation is ordinarily conclusive on appeal if supported by any competent evidence.

3. Appeal and error ⚷1008(3)

Appellate court will accept or adhere to interpretation of a writing adopted by trial court and not substitute another of its own where parol evidence was introduced in aid of its interpretation and such evidence is not before appellate court.

4. Contracts ⚷170(1)

The terms of a contract may be manifested by conduct when not stated in words, and where meaning is doubtful acts of parties done under a contract afford one of the most reliable means of arriving at their intention, and law recognizes practical construction of a contract as best evidence of what was intended by its provisions.

5. Appeal and error ⚷1008(3)

Where union and employer in negotiating collective bargaining agreement could have expressed an intention concerning vacation pay for employees during first year of employment, but did not do so, and parol evidence was taken to establish their intent and construction of contract, trial court's interpretation of contract to effect that an employee, having been in defendant's employ for less than a period of one year, had not qualified for and was not entitled to vacation pay on termination of his employment, was binding on appellate court.

6. Master and servant ⚷73(5)

Where employer did not arbitrarily or in bad faith or illegally terminate employment but sold business in good faith, and employees were entitled to vacation benefits after 12 consecutive months of service, employee was not entitled to recover on quantum meruit for vacation pay based on reasonable value of 10 months service rendered by him at time of sale.

Pauline Nightingale, Edward M. Belasco and Leon H. Berger, Los Angeles, for appellant.

Mitchell, Johnson & Bates, by Elbert J. Sheffield, Los Angeles, for respondent.

GLEN, Judge.

Plaintiff brought this action on behalf of its assignor for one week's vacation pay alleged to be due its assignor from defendant employer. This appeal is on the judgment roll alone, findings of fact and conclusions of law having been waived in the trial court.

Plaintiff's assignor was employed as a clerk by defendant under a collective bargaining contract negotiated between the defendant and the Retail Clerks Union. Insofar as material here, the contract provides as follows:

"Section VII. *Vacations:*

"(A) When the regular employee has been in the employ of the Employer for twelve (12) consecutive months either prior to or after the execution of this agreement, such employee shall be entitled to and shall receive one (1) week vacation annually with pay. When the regular employee has been in the employ of the Employer for thirty-six (36) consecutive months either prior to or after the execution of this agreement, such employee shall be entitled to and shall receive two (2) weeks vacation annually with pay. All time lost from employment because of reasonable absence from work through sickness or other emergencies, or temporary lay-off, shall be considered as time worked for the purpose of determining the length of employment.

"(B) Vacation period shall be granted between April 1st and October 1st of each year, or at other times, if mutually agreeable to the Employer and the employees affected, but in all cases at least ten (10) days notice of the date of vacation shall be given each employee. When a holiday falls during an employee's paid vacation, such employee shall receive an additional day's vacation for such holiday.

"(C) Any employee who has *qualified* for vacation with pay, or who is laid off or discharged, except for his own misconduct, or who resigns, shall receive vacation wages, pro-rated on the basis of the period worked at the time of said interruption or termination of employment." (Italics added.)

Plaintiff's assignor was regularly employed from May 15, 1948, to March 13, 1949, inclusive, by defendant, a period of approximately ten months, when his employment was terminated by sale of the employer's business. Plaintiff contends the employee is therefore entitled to one week's vacation pay because his employment was terminated before he completed one year of service through no fault of his own, and he was thus prevented from performing his side of the contract by defendant. Furthermore, it is contended that if the employee cannot recover on the contract he should recover for ten month's vacation pay, on a pro rata basis on the theory of substantial performance or *quantum meruit.*

There is no contention that the employee was employed for any fixed period or that he was illegally or wrongfully discharged or that the employer in any way breached the contract. It is conceded by both parties that the vacation pay was a part of the consideration furnished by the employer and was thus not a bonus or gratuity. The provisions of Section VII of the contract above quoted are set forth in *haec verba* in the complaint, and admitted in the answer.

[1] Since this appeal is upon the judgment roll and findings were waived, we must presume that the trial court found all facts necessary to support the judgment and that the evidence was sufficient to support the judgment. Credit Bureau of San Diego v. Horeth, 60 Cal.App.2d 47, 139 P.2d 962; Miller v. Pacific Freight Lines, 40 Cal.App.2d 451, 104 P.2d 1069.

"Contrary to the rule contended for by defendant we must, on this appeal, in determining whether the judgment shall be reversed or affirmed, construe all ambiguities in the contracts against defendant and in favor of plaintiff. This is true, if for no other reason, than that on a judgment roll appeal it will be presumed that all evidence necessary to support the findings was received. (Freeman v. Gray-Cowan, Inc. (1933), 219 Cal. 85, 88, 25 P.2d 415.)" Transportation Guarantee Co. v. Jellins, 29 Cal.2d 242, 245, 174 P.2d 625, 627.

Although this appeal is on the judgment roll, defendant contends the contract was submitted to the lower court for construction and that the lower court ruled that the contract was uncertain and received evidence bearing upon the intent of the parties as well as the construction placed upon the contract by the parties themselves.

[2] Where the construction of the contract is submitted to the trial court by the parties and evidence in aid of interpretation thereof is received, the trial court's interpretation is ordinarily conclusive on appeal if supported by any competent evidence.

[3] Although not necessary to sustain the judgment, an examination of the record bears out the defendant's contentions. It contains exhibits consisting of three forms of contract apparently negotiated over the years by the defendant and the Clerks Union, all of which contain Subsection C as above quoted. Among the exhibits is a letter from the Clerks Union which negotiated the contract on behalf of plaintiff bearing upon the construction of Section VII by the parties which is contrary to the plaintiff's contentions.

"It is firmly established that 'the appellate court will accept or adhere to the interpretation (of a writing) adopted by the trial court—and not substitute another of its own—* * * (2) where parol evidence was introduced in aid of its interpretation, and such evidence * * * is not before the appellate court.' 4 Cal.Jur.10-Yr.Supp. (1943 rev.) § 192, p. 146, and cases cited; see, also, 2 Cal.Jur. § 549, pp. 934–939; Estate of Rule (1944), 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319." Transportation Guarantee Co. v. Jellins, 29 Cal.2d 242, 254, 255, 174 P.2d 625.

[4] The terms of a contract may be manifested by conduct when not stated in words. Civil Code, Section 1621.

"And where the meaning is doubtful, the acts of parties done under a contract afford one of the most reliable means of arriving at their intention. The law recognizes the practical construction of a contract as the best evidence of what was intended by its provisions." 6 Cal.Jur. 304, 305.

"Contemporaneous exposition is in general the best." Civil Code, Section 3535.

[5] No doubt the parties in negotiating their contract could have expressed an intention concerning vacation pay during the first year of employment. Since they did not do so and parol evidence was taken to establish their intent and the construction of the contract, the trial court's interpretation thereof is necessarily binding upon us.

The employee having been in the defendant's employ for less than a period of one year had not *qualified* for and was not entitled to vacation pay upon the termination of his employment. The plain terms of the contract itself, when its language is given the ordinarily accepted meaning, so provides.

It is contended by plaintiff that so far as the evidence and pleadings show, the employee during the first year may have been working toward vacation pay and thus entitled to an allowance for the time he was employed. It is, however, just as logical to conclude that the employee had in mind the following language of Section VII, Subparagraph A, of the contract: "When the regular employee has been in the employ of the Employer for thirty-six (36) consecutive months either prior to or after the execution of this agreement, such employee shall be entitled to and shall receive two (2) weeks vacation annually with pay."

The contract under consideration here contains no fixed period of employment, and the employment could be terminated at the will of either party. Labor Code, Section 2922. Plaintiff's assignor was not prevented from performing his contract and thus entitled to enforce the same within the meaning of Sections 1511 and 1512 of the Civil Code because, as is conceded by the plaintiff, the employer's termination of the employment was lawful, was not arbitrary, and was not done in bad faith.

The sale of its business by defendant was not unjustified and is conceded to be bona fide and not made in order to defeat the employees' rights. The sale was one of the hazards of the business world which the parties could well have guarded against in the contract relating to vacation pay had they so desired. Therefore, Section 1511 of the Civil Code, concerning the prevention of performance by one party is not applicable.

"The right of the employer, for general economic reasons, to make use of a smaller staff to operate his business, to decrease his production, or to go out of business entirely if he desires to do so, we regard as indubitable. For example, if an employer has employed ten men to operate ten machines, he may, for such reasons, employ only nine men to operate the ten machines or he may operate only nine machines with only nine men, or, if he chooses, he may cease all operations. * * *

"I do not doubt that an employer possesses the right to go out of business or to decrease his production at any time or for any reason that he sees fit. These weapons remain to him whether he be engaged in a struggle with his competitors or with his employees. * * * To hold otherwise would in fact deprive the employer of the control of his business." Union Drawn Steel Co. & Republic Steel Corp. v. N.L.R.B., 3 Cir., 1940, 109 F.2d 587, 592.

Since there is no contention that the employer acted arbitrarily or in bad faith in terminating the employment by sale of its business, this case does not fall within the rule of substantial performance or *quantum meruit* announced in the case of Roberts v. Mays Mills, Inc., 184 N.C. 406, 114 S.E. 530; 28 A.L.R. 338; and Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 N.W. 769, 44 L.R.A.,N.S., 1214.

If there was any question of substantial performance by plaintiff it could have been litigated by the trial court on the pleadings before it, and since we have only the judgment roll before us, we must presume that that issue was passed upon by the trial court.

[6] Considering the record before us, we cannot find that the plaintiff is entitled to recover upon *quantum meruit* for the reasonable value of the ten month's service rendered by the employee in view of our holding that the employer did not arbitrarily or in bad faith or illegally terminate the employment. To allow recovery upon *quantum meruit* would be to rewrite the contract for the parties without any showing of such necessity and would be contrary to the express terms of the contract and the construction placed upon it by the parties themselves.

To entitle plaintiff to recover on *quantum meruit*, the employer would have had to illegally or arbitrarily or fraudulently or unjustifiably prevented performance by the employee and the employee would have had to perform substantially and be prevented from complete performance by the employer's wrong, as was held in the case of Roberts v. May Mills, Inc., supra, and Zwolanek v. Baker Mfg. Co., supra.

In the Roberts case, supra, the employer on January 15, 1920, promised its employees, in writing, a Christmas bonus if they remained in the company's employ until the end of the year. The plaintiff was discharged on September 13, 1920, and denied a bonus. It appears that the reason for his discharge by the company was that he had uttered some criticism of an officer of the company outside the course of his employment and that he was not discharged because of any dissatisfaction with his services. The trial court had taken the question of wrongful discharge from the jury. The court, after pointing out that the bonus was not a gratuity but was an inducement to the plaintiff to continue in defendant's employ, and was in fact a supplemental contract, held that an employee under the circumstances was entitled to recover on *quantum meruit* if discharged arbitrarily and without sufficient cause, and ordered a new trial in order that the question of whether or not his discharge was upon sufficient grounds or was arbitrary and without cause could be passed upon by the jury as a question of fact. The court at page 531 of the South Eastern citation frames the question for decision as follows: "This case presents for the first time in this court the construction of the effect of an offer by employers to extend a bonus to employees provided they remain a specified length of time, which offer is accepted by the employee entering upon his employment upon such inducement. Should the employee fail to execute his part of the agreement by remaining for a specified time, or is dismissed for failure to do efficient work or for any other good cause, he forfeits his claim to the bonus offered. The question here presented is: Can the employer arbitrarily terminate such agreement at any time without legal and sufficient cause?"

At 114 S.E. page 535 the court answers the question in the following language: "The employee being liable to a forfeiture of all bonus if he quits before the specified time, it would be a breach of faith, and, as one of the authorities above quoted says, 'perilously near the perpetration of a fraud,' if the employer were not liable for a breach of such supplementary contract on his part to the extent at least of payment of the bonus earned up to the time of the discharge, upon a quantum meruit basis, when he has discharged the employee for whatever motive if the ground was not legal and sufficient for termination of the offer of extra compensation for continuous service in the employer's service."

In the Zwolanek case, supra, the employer offered to permit employees to participate in surplus earnings provided they were in the regular employ of the company for a specified period of time. Plaintiff's employment was terminated when he had completed all but one day of the necessary period to qualify him for the bonus. In this case the trial judge directed a verdict for the defendant, and upon appeal the court held that the jury might well have found that there was substantial performance by the plaintiff and that the defendant arbitrarily violated its contract; that there was no justification for the discharge and that the defendant's sole object and purpose in discharging the plaintiff was to prevent him from recovering his share of the profits offered to the employees. At page 773 of the North Western citation the court observes: "We hold that the jury might have found from the evidence that the plaintiff had substantially performed his contract at the time of the discharge, and was entitled to recover on this ground. The jury might also have found that the defendant violated its contract with the plaintiff in discharging him when it did; that there was no justification for the discharge, and that defendant's sole object and purpose in making it was to prevent plaintiff from securing his share of the profits offered to its employes; and, finally, that the plaintiff did not consent to his discharge. Under such a state of facts, the plaintiff is entitled to recover. It is true, as a general proposition, that a party making an offer of a reward may withdraw it before it is accepted. But persons offering rewards must be held to the exercise of good faith, and cannot arbitrarily withdraw their offers, for the purpose of defeating payment, when to do so would result in the perpetration of a fraud upon those who, in good faith, attempted to perform the service for which the reward was offered. First National Bank v. Hart, 55 Ill. 62, and cases heretofore cited."

Other cases relied upon by plaintiff, in which the employee was allowed to recover for vacation pay or a bonus in full or upon a pro rata basis, are all cases in which the employee had fully *qualified* for vacation pay under the terms of the contract or statute in question, and such cases are not applicable to the facts here. Undoubtedly, if plaintiff's assignor had been in the defendant's service for a period of one year, he then would have been entitled to recover one week's vacation pay, and if the employment had been terminated thereafter he would have been allowed to recover on a pro rata basis, because such right was recognized and provided for in the contract between the parties.

We see no other basis, such as mistake or inadvertence in the preparation of the contract, or mutual acceptance of terms not specified in the contract, to allow recovery upon *quasi* contract in this case.

Considering the terms of the written contract itself, the conduct of the parties in construing the same, the fact that the termination was lawful in all respects, we cannot find the plaintiff is entitled to recover vacation pay as claimed for its assignor.

For the foregoing reasons the judgment is affirmed.

TURRENTINE, P. J., and BURCH, J., concur.

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102 Cal.App.2d 404

In re XYDIAS.

XYDIAS v. ADAMSON.

Civ. 18124.

District Court of Appeal, Second District,
Division 2, California.
Feb. 10, 1951.

Proceeding in the matter of estate of Marina Xydias, also known as Marina D. Demos, deceased, wherein Anthony J. Xydias, executor, filed third amended account current and petitioned for instructions to sell estate property, which Sofia G. Adamson contested. The Superior Court, Los Angeles County, Newcomb Condee, J., entered order adverse to executor, and he appealed. The District Court of Appeal, Moore P. J., held that under will devising life estate to husband with remainder to daughter, administration expenses were payable from income, therefore, there was no necessity for sale of corpus of estate for that purpose.

Order affirmed.

See also 92 Cal.App.2d 857, 208 P.2d 378.

1. Appeal and error ⇨846(5)

Evidence was assumed to support implied findings of lower court in absence of express findings and transcript of proceedings.

2. Wills ⇨736

Will that devised property to husband for life, and provided that on his death all property should revert to daughter, indicated no intent that husband was to have income from property undiminished by administration expenses, nor that corpus should be sold to pay such expenses, but indicated that remainderman was to receive corpus undiminished.

3. Wills ⇨736

Where will separates income from estate, makes distribution thereof to designated legatee and says nothing as to administration expenses, intention is reasonably inferred that income will be free from administration expenses.

4. Wills ⇨736

Will that devised life estate to husband, with remainder to daughter, did not divide estate, separate income from estate, nor make specific bequest of income, therefore, income which husband was entitled to receive as life tenant was subject to administration expenses.

5. Wills ⇨736

Where will devised life estate to husband but made no specific devise of property or income to him, and husband as executor, had possession of income from estate in excess of administration expenses, such expenses were payable out of income, therefore, there was no necessity for sale of corpus for that purpose. Probate Code, §§ 300, 750.

◆

John D. Gray, Los Angeles, for appellant.

Henry Merton, Los Angeles, for respondent.

MOORE, Presiding Justice.

Appeal from an order instructing the executor not to sell property of the estate and determining that the income is sufficient to pay expenses.

Appellant as executor of decedent's estate filed his third amended account current and petitioned for instructions to sell, showing the value of the assets to be $25,943.81 and him to have dispersed $1,326.90. He set forth that the inheritance taxes due the state amounted to $277.83; that payments made out of his personal funds for the estate aggregate $2,132.23 which includes payment of statutory fees to the executor and to the executor's attorney; that the estate will become liable for commissions to the executor and his attorney in the amount of $1,211.50. This he follows with the declaration that there are no funds with which to pay these obligations; that it is necessary that parcel II, an unproductive and unimproved real property, be sold in order to pay these estate obligations. Following a statement of extended efforts on the part of himself and his attorneys to collect certain claims of the estate, he alleges that it is necessary to continue the administration for the purpose of realizing on uncollected assets and of selling unproductive property which has already necessitated the payment for taxes of more than half of its appraised value and that from the proceeds of such sale the unpaid obligations of the estate may be paid; that executor has been using the rentals from parcel I for his living expenses and to pay the costs of its maintenance.

[1] Appellant is the devisee of a life estate in the properties bequeathed by his deceased wife, and Sofia G. Adamson, her daughter and contestant, is the remainderman. Executor now contends that the costs and expenses of administration should be paid out of the corpus of the estate while contestant contends that such costs should be paid out of rentals accruing after the death of decedent from real property specifically devised to the executor as life tenant. In the absence of the express findings and of a transcript of proceedings in the court below, it will be assumed that the evidence supported the implied findings. Indeed, in their absence there is no basis for attacking the order on appeal.

[2] The clause of the will bequeathing the property first devises it to appellant, after which the will proceeds: "on the death of my husband * * * I wish all of the above money, property, etc. to revert to my only daughter, Sofia G. Adamson." Despite the provision that the remainder revert to the daughter, appellant insists that the income from the estate which has accrued during the probate should not be used to pay the expenses of administration but that they are to be reserved for appellant only as the devisee of the life estate. His thesis is contrary to authorities and to sound reason. The language of the will bequeathes *all* her property in remainder to her daughter. There is nothing in the document to indicate that it was the desire of the testatrix for her husband to have the whole of the income to the exclusion of the expenses incurred in the administration or that non-income-bearing property should be sold to pay such expenses. In each of the cases cited by appellant in support of his contention, In re Estate of Platt, 21 Cal.2d 343 131 P.2d 825; In re Estate of Dare, 196 Cal. 29, 235 P. 725; In re Estate of Schiffmann 86 Cal.App.2d 638, 195 P.2d 484; In re Estate of Lair, 38 Cal.App.2d 737, 102 P.2d 436, the will provided that the income earned by the estate be specifically devised to certain beneficiaries and be distributed by the trustee named to receive and administer the estate. For illustration: in the Estate of Platt, the residue of the estate was bequeathed to a bank in trust with directions to pay the widow certain moneys from the income until her marriage and if the income exceed a specified amount the excess shall go to a son.

[3, 4] Where a will separates the income from the estate, makes distribution thereof to a designated legatee and says nothing on the subject of expenses of administration, the intention is reasonably inferred that the income which accrues will be due the beneficiary named, free from administration expenses. See Estate of Schiffmann, supra, 86 Cal.App.2d at page 647, 195 P.2d 484. The will of decedent herein does not separate the income from the estate; nor does it make a specific bequest thereof to the husband. While it is true that a life tenant is entitled to receive the income during his tenancy, there is nothing in the nature of the estate be-

queathed to him from which it can be reasonably inferred that it is to be free from the burden of overall expenses of probate administration. The will is devoid of any words which indicate that the property which is to go to the remainderman shall undergo any diminution during the continuance of the life estate. On the contrary, "*all* of the said property, money, etc." are to pass to the remainderman.

Contrary to appellant's contention the will does not divide the estate into two parts. While there are two beneficiaries, the life tenant enjoys a lesser estate and the remainderman the greater. But neither by any language nor by any reasonable construction thereof can it be said that the will makes a separate gift of income or makes any division of the property.

[5] Inasmuch as the executor has possession of funds collected by him from decedent's estate in excess of the sum required to pay the expense of administration, and particularly in view of the fact the testatrix made no specific devise or gift of her property or of the rent or income therefrom to her husband there is no necessity for a sale of any part of the corpus of the estate for the purpose of paying costs of administration. In re Estate of Bragg, 166 Cal. 103, 134 P. 1140; Probate Code, secs. 300 and 750.

Order affirmed.

McCOMB and WILSON, JJ., concur.

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102 Cal.App.2d 302

PEOPLE v. NEWMAN.

Cr. 4460.

District Court of Appeal, Second District,
Division 2, California.
Feb. 15, 1951.

Rehearing Denied Feb. 26, 1951.

Hearing Denied March 15, 1951.

James J. Newman was convicted in the Superior Court, County of Los Angeles, George Francis, J., of robbery with a deadly weapon, and of three prior felony convictions, and he appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to support the verdict.

Judgment and order denying motion for new trial affirmed.

1. Robbery 🔑24(3)

In robbery prosecution, evidence was sufficient to identify defendant.

2. Robbery 🔑24(1)

Evidence sustained defendant's conviction of robbery.

3. Criminal law 🔑1160

Proof of identity of a defendant is a matter for jury, and where there is substantial testimony in support of identity and trial judge denied a new trial, conviction will not be reversed because of failure of memory of one or more witnesses to the event under consideration.

4. Criminal law 🔑1159(5)

Rule which applies to finality of jury's finding of corpus delicti applies equally to accused's identification, and lack of positiveness of identity of accused does not destroy value of the identification.

5. Criminal law 🔑1160

Where a verdict has substantial proof to support it, and trial judge has denied a retrial, verdict cannot be set aside by court of appeal for lack of evidence.

6. Criminal law 🔑1159(4)

Uncertainties in testimony of several witnesses are matters to be directed to attention of jury and trial court, and cannot be urged on appeal. Code Civ.Proc. § 1847.

7. Criminal law 🔑572

In robbery prosecution, evidence was insufficient to establish defendant's alibi.

8. Criminal law 🔑414

In robbery prosecution, declarations of defendant and his confederates, which were a part of res gestae, were sufficient proof of deadly character of guns they carried, and jury could infer that they carried deadly weapons, notwithstanding revolver used by defendant and wallets taken from his victims were not produced at trial.

9. Stipulations 🔑14(7)

In robbery prosecution, where defendant stipulated that if certain of complainants were called to testify, they would state that they were robbed at a clubroom on date of crime by three men, each of whom was armed with a deadly weapon, defendant could not contend there was no evidence that revolver he used was lethal.

10. Robbery ⚿20

In robbery prosecution, proof that revolver used by defendant was lethal, was not essential.

11. Criminal law ⚿1170½(1)
Witnesses ⚿337(5)

In robbery prosecution, where defendant took witness stand and denied accusation, he subjected himself to impeachment by showing that he had suffered prior felony convictions, and nature of them, and defendant's cross-examination testimony as to prior convictions was an admission, and admission of that testimony was not prejudicial error. Pen. Code, § 1025.

12. Criminal law ⚿1036(2), 1044

In robbery prosecution, where defendant did not object to any of the questions on his cross-examination, and no misconduct was assigned nor any motion made to admonish jury to disregard questions or answers, defendant's contention that impeachment violated his rights was without merit.

◆

Bernard C. Brennan, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was convicted on ten counts of robbery with a deadly weapon, and of three prior felony convictions. He demands a reversal of the judgments and the order denying his motion for a new trial on the grounds that they are not supported by the evidence; there is no proof that he was armed with a deadly weapon; he was irreparably prejudiced by his examination as to prior convictions.

The complaining witnesses were engaged at a card game in a club room in the San Pedro area of the City of Los Angeles when three men entered the room, terrorized them with firearms and robbed them of various amounts of money and, in some instances, of their wallets. The robbers said, "put up your hands—this is a hold-up." Appellant was the leader of the trio and gave the directions. Holding his gun in his right hand he said, "I want you fellows to do what you're told and no one will get hurt." The victims were told to stand by and face the wall and remain so for three minutes after the bandits should leave. When one of the latter had difficulty in opening the cash register, he said, "Well, we may have to shoot somebody."

[1] In pursuance of his attempt to establish an alibi, appellant's counsel closely cross-examined each of the witnesses as to the identity of appellant as the person they had seen commit the robberies. While not each of the witnesses was firm in the identification of appellant there was substantial proof thereof. Complainant Mihaljevich though doubtful of the identity testified, "I'm not sure * * * but he looks like the man who was there." When complainant Zuvich was asked to identify anyone in the courtroom as one of the robbers he pointed to appellant. Complainant Lucev testified that appellant looked like one of them. Complainant Dragin testified that appellant looked like the robber. Complainant Marincovich testified that appellant looked like the robber who had a blue automatic pistol. Pointing to appellant complainant Vitalich testified, "I am positive sure that this is the man here" who had the gun. Complainant Carr did not think that appellant was the armed robber but admitted having testified at the preliminary hearing that he thought appellant was the man. Complainant Zurich was positive that appellant was one of the bandits. He was only 20 feet away from him; he looked at him pretty good seven or eight minutes. Also, Zurich identified appellant for the police.

The witnesses Kaloper, Jaconi and Kucich who were present at the robbery declared appellant was one of the armed bandits.

Appellant told the arresting officers that he stayed in the City of Los Angeles in the vicinity of about 30 miles north of the club room where the robbery occurred until about 9:30 p. m., then went to Hollywood which is about eight miles west of the civic center of Los Angeles, then to a barroom at the corner of Figueroa and Pico streets which is about one mile south of the civic center. At no place did he meet anyone he knew.

When appellant took the witness stand he testified that he left home about 9 o'clock, drove his father's car to downtown Los Angeles; entered a theater about 9:30 p. m.; remained until 11:30; stopped at the barroom at Pico and Figueroa and from there drove home where he arrived about 1 a. m. He denied having been in San Pedro or that he committed the robbery. He testified that he saw two picture shows; that he did not remember having told the officers that he remained at home until about 8 or 8:30 p. m. and denied having told them that "I wouldn't tell you anything if I knew it."

[2–5] Such evidence is clearly sufficient to support the verdicts. Proof of identity is a matter for the jury's determination and where there is substantial testimony in support of the identity and where the trial judge has denied a new trial, the judgment will not be reversed because of the failure of the memory of one or more witnesses to the event under consideration. The rule which applies to the finalty of the jury's finding of the corpus delicti applies equally to the identification of the criminal. Lack of positiveness of identity of the accused does not destroy the value of the identification. People v. Ash, 88 Cal.App.2d 819, 825, 199 P.2d 711. When a verdict has substantial proof to support it and the trial judge has denied a retrial, it cannot be set aside for lack of evidence. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

[6] Appellant contends that only one witness definitely identified him as the armed bandit who led his companions into the clubroom. Even were this true, when believed by the jury, the testimony of one witness is sufficient to support a verdict for the reason that such testimony is not inherently incredible. People v. Alexander, 92 Cal.App.2d 230, 206 P.2d 657. The uncertainties in the testimony of the several witnesses were matters to be directed to the attention of the jury and the trial court and cannot be urged on appeal. Code Civ.Proc. sec. 1847; People v. Skaggs, 80 Cal.App.2d 83, 97, 181 P.2d 390; People v. DeWitt, 98 Cal.App.2d 709, 220 P.2d 981.

However, we are not forced to depend for an affirmance upon the testimony of one witness. Seven complainants and their associates gave such proof of the crime and of appellant's identity as to justify a finding of his guilt.

[7] Despite his own testimony in support of his alibi, appellant did not satisfactorily account for his time on the evening of the robbery. He contradicted the story he had told to the investigating officers. In his statement to the latter he made no mention of having attended a show but when he came to give his testimony at the trial, he placed himself in a theater between 9:30 and 11:30 p. m. during which he witnessed two pictures, the details of one of which he could not remember. Not a witness was produced to corroborate his testimony that he had attended the theater or visited the barroom. No one testified as to his movements during the fateful evening. Finally, his testimony was impeached by his three prior felony convictions.

[8–10] Appellant makes the novel contention that none of the wallets taken from the victims was produced at the trial or found on his person at the time of arrest. No court or jury would be so naive as to expect a bandit to tie up his loot in a handsome package and preserve it for exhibition. His instinct to avoid apprehension is too deeply ingrained for such a performance. The same is true as to the revolver which, appellant argues, was never found or described. He contends that there is no evidence that the revolver used was lethal. Such proof is not essential. Appellant and his companions supplied that element of the crime by training their guns on the victims, requiring complainants to lift their hands, to make no unfriendly gesture or "we may have to shoot somebody." Actions speak louder than words. The declarations of appellant and his confederates, a part of the *res gestae,* are sufficient proof of the deadly character of the guns they carried Out of an abundance of the heart, the mouth speaketh. From their movements and threats uttered during the exciting moments of the crime the jury were entitled to infer that they carried deadly weapons. People v. Montgomery, 15 Cal.App. 315, 318, 114 P. 792. In People v. Ash, supra, we held that "where a dangerous or deadly weapon is employed by a robber to enforce his demands it is immaterial whether it was used or exposed to view." [88 Cal.App.2d 819, 199 P. 718.] In the instant case appellant's revolver accomplished its purpose by its challenge that the actor was ready, able and willing to make it deadly. His representation that the weapon he flourished was deadly and that he would kill if forced to do so was intended by him to have his victims accept his threats as true and thereby to immobilize them by a reasonable fear. See Cittadino v. State, 199 Miss. 235; 24 So.2d 93. Finally, wholly apart from the evidence or the authorities, appellant's point is answered by his stipulation made at the commencement of the trial, to wit, certain of the complainants would if called to the stand testify that they were robbed at the clubroom on the date of the crime by three men, each of whom was armed with a deadly weapon.

[11, 12] Appellant contends that his substantial rights were grievously and irreparably prejudiced by his examination as to prior convictions. In this there was no error. Having taken the witness stand and denied the accusation, he subjected himself to impeachment by showing that he had suffered prior felony convictions and the nature of them. By such impeachment the prosecutor did not violate the provisions of section 1025 of the Penal Code. People v. Romer, 1933, 218 Cal. 449, 452, 23 P.2d 749; People v. Peete, 1946, 28 Cal.2d 306, 319, 169 P.2d 924; People v. O'Brand, 1949, 92 Cal.App.2d 752, 755, 207 P.2d 1083; People v. Youders, 1950, 96 Cal.App.2d 562, 567, 215 P.2d 743.

But the contention that the impeachment was violative of any right of appellant is wholly without merit in view of the fact that not an objection was entered to any of the questions and neither was any misconduct assigned nor motion made to admonish the jury to disregard the questions or the answers. People v. O'Brand, supra; People v. Ash, 88 Cal.App.2d 819, 829, 199 P.2d 711.

The judgment and the order denying the motion for a new trial are affirmed

McCOMB and WILSON, JJ., concur.

102 Cal.App.2d 293

BENNETT v. LOS ANGELES TUMOR INSTITUTE et al.

Civ. 18029.

District Court of Appeal, Second District, Division 2, California.

Feb. 15, 1951.

Rehearing Denied March 5, 1951.
Hearing Denied April 12, 1951.

Action by Margery Bennett against the Los Angeles Tumor Institute and Dr. Roy W. Johnson for malpractice for damages resulting from X-ray burns allegedly caused by negligence of defendant physician in administering X-ray treatments to plaintiff for papillomae. A Superior Court, Los Angeles County, Paul Nourse, J., rendered judgment of non-suit and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that doctrine of res ipsa loquitur did not apply and question of negligence could only have been resolved by expert testimony.

Judgment affirmed.

1. Physicians and surgeons 🔑18(6)

Doctrine of res ipsa loquitur in field of malpractice is applied only in restricted class of cases where layman is able to say as matter of common knowledge and observation that consequences of professional treatment were not such as ordinarily would have followed if due care would have been exercised.

2. Physicians and surgeons 🔑18(6)

In malpractice action it is necessary for plaintiff to establish that defendant did not possess the degree of learning and skill ordinarily possessed by physicians of good standing practicing in same locality and that he did not use ordinary care and diligence in applying that learning and skill to treatment of his patient.

3. Physicians and surgeons 🔑18(8)

Question whether there has been a breach of standard of ordinary care and diligence in applying that learning and skill ordinarily possessed by physicians in good standing practicing in same locality, can only be resolved by testimony of experts.

4. Evidence 🔑14
Physicians and surgeons 🔑18(6)

In malpractice action, it could not be said as matter of common knowledge that condition on bottom of plaintiff's feet, which included blisters and sore on soles and tops of her feet and on her shins, was something caused by negligence of physician in giving plaintiff X-ray treatments for papillomae, and in absence of expert medical testimony, inference that condition was proximately caused either by a change in original condition suffered by plaintiff or by some new trouble having nothing to do with radiation, was just as reasonable and res ipsa loquitur doctrine was not applicable.

5. Appeal and error 🔑971(2)
Evidence 🔑546

Question whether a person is qualified as an expert is a matter ordinarily addressed to sound discretion of trial court, and its ruling on appeal will not be disturbed unless a clear abuse of such discretion is demonstrated.

6. Evidence 🔑538

Determination that physician who was graduate chiropodist, licensed to treat diseases of feet and permitted to use X-ray treatment, but who had not studied use of X-ray for treatment, had never in his practice administered X-ray treatments therapeutically and had only seen two cases of X-ray burns in twenty years of practice, was not qualified to testify that injury to plaintiff's foot was an X-ray burn, was not an abuse of discretion.

7. Appeal and error 🔑837(5)

In action for malpractice, where trial court refused to permit plaintiff to use medical textbook in her cross-examination of defendant physician and such evidence was offered solely for purpose of impeaching physician's prior testimony, it could not be considered in reviewing correctness of judgment of nonsuit.

Russell H. Pray, Long Beach, for appellant, William C. Price, Long Beach, of counsel.

Hunter & Liljestrom, Los Angeles, for respondents, Harold J. Hunter, Los Angeles.

MOORE, Presiding Justice.

This is an appeal from a judgment of nonsuit in an action for malpractice against the respondents, Los Angeles Tumor Institute and Dr. Johnson, its radiologist, for damages resulting from X-ray burns allegedly caused by the negligence of defendant doctor in administering X-ray treatments to appellant for papillomae. The nonsuit was granted on two grounds: (1) the evidence failed to show that plaintiff suffered X-ray burns or that respondents were negligent in their treatment; (2) the evidence established without conflict that the action was barred by section 340, subdivision 3 of the Code of Civil Procedure.

The evidence did not require a submission to the jury. Prior to consulting defendant Johnson for relief, plaintiff was suffering from papillomae on the ball of each foot. The affliction had caused her considerable pain and had not responded to other treatments. Dr. Johnson administered X-ray therapy to her on three occasions at weekly intervals commencing February 6, 1947. The relationship of physician and patient terminated about six weeks after the last treatment. At that time, according to appellant, those portions of the soles to which the X-rays had been applied were deep red at the center, pink in the circumference of the circle, and it was all tender. In July the area treated started to granulate. To use the words of the appellant, it "had the appearance of crystallized fruit," and from that time sloughing of the tissue continued and thereafter small blisters developed over the injured areas and over the dorsum of each foot. In February, 1948, the appellant was attended by Dr. Pritikin, a chiropodist who testified that the ball of each foot over a circle one inch and a quarter in diameter was denuded and that there was a colorless exudate from the area such as is seen in burns. The condition did not respond to treatment by Pritikin and appellant was unable to pursue her ordinary occupation from May until October, 1948. Thereafter she received treatment from a dermatologist and the lesions on the bottom of her feet healed leaving scar tissue over the sites of the lesions which appellant testified were sore and which apparently did not have the same amount of tissue underneath the surface as the balance of the area of her soles.

Dr. Johnson and appellant both testified that the X-rays were administered by placing a metal tube with an opening at the outer end three fourths inch in diameter against the bottom of the foot at the site of the papilloma. The balance of the foot, according to the doctor, was shielded by a sheath of lead. The unfortunate young woman had no recollection of a leaden shield.

Appellant contends that such evidence was sufficient to warrant submitting the issue to the jury under the doctrine of *res ipsa loquitur,* relying on Moore v. Steen, 102 Cal.App. 723, 283 P. 833, and Ragin v. Zimmerman, 206 Cal. 723, 276 P. 107. The doctrine was applied to X-ray burns in these decisions but they are distinguishable from the case at bar in that their plaintiffs suffered X-ray burns of which there was no denial. The X-rays therein involved were used solely for diagnostic purposes and in the Moore case the court itself pointed out this distinction 102 Cal.App. at page 731, 283 P. at page 836.

[1-3] The application of the doctrine of *res ipsa loquitur* is necessarily limited in the field of malpractice. The courts have applied it in only a restricted class of cases where the layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised. Moore v. Belt, 34 Cal.2d 525, 530, 212 P.2d 509; Engelking v. Carlson, 13 Cal.2d 216, 221, 88 P.2d 695.* In the usual malpractice action it is necessary for the plaintiff to establish that the defendant did not possess "the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and that he shall use ordinary care and diligence in applying that learning and skill to the treatment of his patient." Engelking v. Carlson, supra, 13 Cal.2d at page 220, 88 P.2d at page 697; Hesler v. California Hospital Co., 178 Cal. 764, 766, 174 P. 654. The question as to whether there has been a breach of this standard of care is one which can be resolved only by the testimony of experts. Moore v. Belt, supra, 34 Cal.2d at page 529, 212 P.2d 509. In the Moore case the *res ipsa loquitur* doctrine was rejected. The court held it inapplicable where infection followed a cystoscopic examination of the plaintiff's bladder, and pointed out that in decisions holding the doctrine applicable, evidence that the defendant did not cause the injury was remote and it followed as a matter of common knowledge from the nature of the injury that the result would not happen without negligence. The record therein had revealed substantial evidence from which the jury could reasonably conclude that the plaintiff's injury was not caused by the defendant but had its source in a prior condi-

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* Examples of its proper application are Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409 (sponge left in abdominal cavity); Timbrell v. Suburban Hospital, 4 Cal.2d 68, 47 P.2d 737 (burn caused by hot compress or hot water bottle); Dierman v. Providence Hospital, 31 Cal.2d 290, 188 P.2d 12 (explosion of anesthetic during course of cauterizing a wound).

tion which was the proximate cause of the trouble.

[4] Such observation is pertinent to the facts at bar. It cannot be said as a matter of common knowledge that the condition which the plaintiff described which included blisters and sores on the soles and tops of her feet and on her shins was something caused by the negligence of Dr. Johnson. In the absence of expert medical testimony the inference that the condition was proximately caused either by a change in the original condition suffered by plaintiff or by some new trouble having nothing to do with the radiation was just as reasonable. Under such circumstances the res ipsa doctrine is not applicable. LaPorte v. Houston, 33 Cal.2d 167, 170, 199 P.2d 665.

[5] Appellant also urges a reversal on the ground that the court erred in refusing to permit Dr. Pritikin to testify as to his opinion that the injury was an X-ray burn. Conceding the force and soundness of appellant's argument, it is still the rule that the question whether a person is qualified as an expert is a matter ordinarily addressed to the sound discretion of the trial court, and its ruling on appeal will not be disturbed unless a clear abuse of such discretion is demonstrated. Moore v. Belt, supra, 34 Cal.App.2d at page 532, 212 P.2d at page 509; Sinz v. Owens, 33 Cal.2d 749, 753, 205 P.2d 3, 8 A.L.R.2d 757. Professor Wigmore goes so far as to say that "the trial court must be left to determine, absolutely and without review, the fact of possession of the required qualification by a particular witness." (Wigmore on Evidence, 3d Ed., Vol. II, sec. 561, p. 641.)

[6] The record herein shows Dr. Pritikin to be a graduate of a school of chiropody; that he was licensed in California to treat diseases of the feet and thereby permitted to use X-ray treatment; that he had had courses in anatomy, physiology, histology, bacteriology, physiotherapy and X-ray; that he had spent four and one half years in the Navy attached to an X-ray department of a hospital; that he had studied dermatology and skin conditions. However, it was also shown that the witness had not studied the use of X-ray for treatment; had never in his practice administered X-ray treatments therapeutically; only once had he ever had occasion to distinguish between skin conditions arising from X-ray burns and those resulting from the direct application of heat which was in 1935; he had never treated such a burn; had seen only two cases of X-ray burns in twenty years of practice; his use of X-ray in the Navy was for diagnostic purposes only, the therapeutic work having been performed by another department. There was no evidence introduced of any private study of the subject through attendance at lectures, reading, or by contact with other men in the field. The trial court's decision cannot be said to reflect an abuse of discretion. Agnew v. City of Los Angeles, 97 Cal.App.2d 557, 218 P.2d 66, and Mirich v. Balsinger, 53 Cal.App.2d 103, 127 P.2d 639, are distinguishable on their facts. The qualifications of the witnesses involved in those cases could hardly be the subject of debate as a perusal of the decisions will disclose.

[7] Appellant assigns as prejudicial error the court's ruling whereby it forbade her to use a medical textbook in her cross examination of Dr. Johnson. Inasmuch as such evidence was offered solely for the purpose of impeaching the witness' prior testimony, it cannot be considered in reviewing the correctness of the judgment of nonsuit. It is therefore not necessary to discuss the assignment.

In view of the conclusions derived with respect to the primary issue, it will be of no avail to discuss the statute of limitations.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; CARTER, J., dissenting.

102 Cal.App.2d 249

MILLARD v. MILLARD.

Civ. 14542.

District Court of Appeal, First District, Division 2, California.

Feb. 13, 1951.

Hearing Denied April 12, 1951.

Inez Millard brought action against Maxwell Millard for divorce. The Superior Court, County of Alameda, Ralph E. Hoyt, J., rendered judgment for plaintiff, awarded custody of daughter to plaintiff, and ordered defendant to contribute to duaghter's support. Plaintiff filed notice of motion for execution on unpaid support installments, and prior to hearing, execution was ordered on ex parte application of plaintiff. After hearing, trial court ordered execution to issue, with stay until final determination of validity of ex parte order, and defendants appealed. The District Court of Appeal, Dooling, J., held that writ of execution issued as a matter of right for unpaid support installments accruing within five years of date of ex parte application for execution.

Order denying motion to quash affirmed, appeal from order for execution dismissed.

1. Divorce ⚷311

In wife's divorce action wherein husband was ordered to contribute to support of daughter, execution for unpaid support installments which had occurred within five years of wife's ex parte application issued as a matter of right without showing of diligence, though installment judgment had been entered over five years before application. Code Civ.Proc. §§ 681, 685.

2. Courts ⚷91(1)

Intermediate court will not reappraise rule which Supreme Court has recently and definitely stated.

3. Execution ⚷1

Right to execution may be barred on equitable grounds.

4. Appeal and error ⚷931(1)

On appeal from court order, conflicts in evidence must be resolved in favor of order, and where there is room for conflicting inferences, those most favorable to order must be drawn.

5. Divorce ⚷311

In wife's action for divorce wherein wife obtained support judgment for daughter and order for execution for unpaid support installments, conflicts in evidence as to terms of oral agreement waiving support installments was resolved in favor of order.

6. Divorce ⚷311

In wife's action for divorce wherein wife obtained order for execution for unpaid support installments, evidence that husband executed written consent to adoption of daughter by wife's present husband pursuant to oral agreement waiving installments was reasonably considered by trial judge as attempt to secure benefits of repudiated agreement after execution proceeding had been instituted.

7. Appeal and error ⚷790(2)

Where order was inoperative by its own terms until invalidity of prior order was determined, and prior order was declared valid, appeal from subsequent order presented moot question. Code Civ.Proc. §§ 681, 685.

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John Charles Houlihan, Oakland, for appellant.

Cooley, Crowley & Gaither, San Francisco, for respondent.

DOOLING, Justice.

Plaintiff procured a final decree of divorce from defendant in 1942 by the terms of which plaintiff was awarded the custody of a daughter, Barbara, and defendant the custody of a son, Craig. The decree ordered defendant to pay plaintiff $50 a month for his daughter's support. Payments were made in full under this decree to January, 1946 but no payments were made thereafter. In October, 1949 plaintiff served and filed a notice of motion for execution on these unpaid instalments, supported by plaintiff's affidavit. Before this motion was heard plaintiff made an ex parte application for execution and execution was ordered issued upon this application on November 4, 1949. Defendant opposed the noticed motion and after a hearing the court on November 14, 1949 ordered execution to issue with the following qualification: "that said Order for Issuance of Execution be stayed until a final adverse determination be made as to the validity of an Ex Parte Order made herein for issuance of execution under Section 681, C.C.P. on November 4th, 1949."

Defendant moved to quash the order for execution made ex parte and this motion to quash was denied on December 13. From the order for issuance of execution of November 14 and the order of December 13 denying his motion to quash defendant has appealed. Since the order of November 14 is by its own terms, stayed until the order of November 4 is invalidated it will not be necessary to consider the order of November 14 further if we determine that the order of December 13 refusing to quash the writ of execution issued November 4 must be affirmed.

[1, 2] Defendant attacks the ex parte order of November 4 on the ground that the judgment being over five years old execution could only issue after a noticed motion supported by a showing of diligence under Code of Civ.Proc. sec. 685. Since all the instalments for which execution issued accrued within five years of the date of the ex parte application the rule announced in Lohman v. Lohman, 29 Cal.2d 144, 173 P.2d 657; Wolfe v. Wolfe, 30 Cal.2d 1, 180 P.2d 345; and Di Corpo v. Di Corpo, 33 Cal.2d 195, 200 P.2d 529 is applicable. The rule of these cases is that although an instalment judgment was entered over five years before the application for execution is made a writ of execution will issue under Code Civ.Proc., sec. 681 as a matter of right for instalments accruing within the five year period on an ex parte application showing that such instalments have not been paid. Defendant asks us to reexamine this rule. It would be futile for an intermediate court to attempt the reappraisement of a rule which the majority of the Supreme Court has so recently and definitely stated on three successive occasions.

[3] Defendant attempted on his motion to quash to show equitable grounds sufficient to bar the plaintiff's right to execution. Lohman v. Lohman, supra, 29 Cal.2d at page 150, 173 P.2d 657; Cochrane v. Cochrane, 57 Cal.App.2d 937, 939–940, 135 P.2d 714. If his affidavits were believed by the trial court, on December 27, 1945 plaintiff, plaintiff's present husband and defendant entered into an oral agreement whereby defendant agreed to give his written consent to the adoption of his daughter by plaintiff's present husband, plaintiff agreed to give her written consent to the adoption of her son by defendant's present wife, and plaintiff agreed to waive payment by defendant of all future instalments provided for the daughter's support. Thereafter despite her oral agreement (still paraphrasing defendant's affidavits) plaintiff refused to give her consent to the adoption of her son by defendant's wife, but none the less defendant was at all times willing to give his consent to his daughter's adoption and relying on the oral agreement defendant failed to make any payments under the decree thereafter, and by reason of a change of business and a consequently reduced income it would now be a hardship on defendant to be compelled to make such payments.

We need not decide whether this showing if uncontroverted would be such as to compel the court as a matter of law to order the execution to be quashed, becase this version of the facts was controverted in important particulars.

The divergent versions of plaintiff and defendant are highlighted by the following quotations from their affidavits before the court in passing upon the two motions. The plaintiff's affidavit recites:

"That on or about the 27th day of December, 1945, a discussion was had between plaintiff's present husband and defendant concerning a consent by defendant to the adoption by plaintiff's present husband of the said minor child, Barbara Millard; that at said time, defendant agreed that he believed that it would be to the said child's best interests if such an adoption was made, and agreed that he would give his written consent thereto; that plaintiff's present husband then stated that if defendant would so consent to such an adoption, in writing, he the said defendant would no longer be required to make the payment required of him to be made to affiant for the support and maintenance of said minor child Barbara Millard; that said agreement was entirely oral; that defendant subsequently refused to give his written consent to such an adoption unless affiant consent to an adoption by defendant's present wife of another minor child of plaintiff and defendant; that affiant refused to consent to this and defendant thereupon discontinued making payments for the support of Barbara Millard, the minor daughter of the parties hereto, as required by the provisions of the order heretofore set out, and has refused and still refuses to comply with the terms of said order."

In contrast we quote from defendant's affidavit:

"That defendant alleges, contrary to the hereinbefore mentioned affidavits of plaintiff, that the discussion between the parties on the 27th day of December, 1945, resulted, in addition (to) the representations that defendant would no longer be expected to comply with the said order, in a mutual agreement that defendant would consent to the adoption of Barbara Millard by plaintiff's present husband and that plaintiff would consent to the adoption of Craig Millard, the other minor child of the parties, by defendant's present wife; that this agreement was separate and apart from the agreement between plaintiff and defendant that defendant would no longer be required to forward the support money payments; that defendant relied upon the agreement concerning the mutual adoptions and within four (4) months thereafter instructed his attorney to take the necessary steps to procure the adoption of Craig Millard by defendant's present wife; that said proceeding was instituted in the Superior Court of the State of California, in and for the County of San Mateo on the 23rd day of May, 1946, and was dismissed in September of 1946, at the request of the petitioner, Vera Edith Millard, after plaintiff refused to consent thereto; that although no petition for the adoption of Barbara Millard was filed from December, 1945, until the date hereof, defendant has remained willing to consent to the adoption by plaintiff's present husband."

[4] We must assume in support of the challenged orders that the trial judge found the facts most favorable to plaintiff and it is elementary that on appeal not only must all conflicts in the evidence be resolved in favor of the court's orders but where there is room for conflicting inferences the inferences most favorable to those orders must be drawn. Wright v. Delta Properties, Inc., 79 Cal.App.2d 470, 180 P.2d 57.

[5, 6] Following this settled rule we must assume that the trial judge found that the promise to waive future payments under the decree was only to become operative on defendant's giving his written consent to the adoption of his daughter and was not an independent promise as stated in defendant's affidavit; that it was not a part of this oral agreement that plaintiff would give her consent to the adoption of her son by defendant's wife, but that in violation of his agreement to give his written consent to his daughter's adoption defendant nevertheless refused to give such consent unless plaintiff would give her written consent to the adoption of her son; and that following plaintiff's refusal to give such consent defendant thereafter refused to make any further payments under the decree. In this view of the facts defendant's tardy execution and mailing of such written consent after proceeding to secure execution had been instituted might reasonably be considered by the trial judge as a belated attempt to secure the benefits of an agreement which defendant had theretofore repudiated because of plaintiff's refusal to consent to the adoption of her son by defendant's wife.

[7] The order denying defendant's motion to recall and quash the writ of execution is affirmed. The order of November 14, 1949 is inoperative by its own terms until the order for execution of November 4 is declared invalid and since that contingency will not occur the appeal from that order presents a moot question. The appeal from the order of November 14, 1949 is accordingly dismissed.

SCHOTTKY, Justice pro tem., concurs.

102 Cal.App.2d 241

AIRLINE TRANSPORT CARRIERS, Inc. v. BATCHELOR.

Civ. No. 14522.

District Court of Appeal, First District, Division 2, California.

Feb. 13, 1951.

Action by Airline Transport Carriers, Inc., against George Batchelor, for money had and received. A default judgment was entered against the defendant, who filed notice of motion to set aside the default judgment. A minute order was entered granting motion to set aside and vacate default judgment and requiring defendant to file bond. The defendant was served with an order to show cause why judgment should not be entered and judgment issued against the bond on the ground that the default had not been set aside. The defendant filed notice of motion to correct the minute order. The Superior Court in the State of California in and for the City and County of San Francisco, Lile T. Jacks, J., denied such motion and entered an order granting the order to show cause and rendered judgment against defendant and execution was issued on the bond, and the defendant appealed. The District Court of Appeal, Schottky, J., Pro Tem., held that the refusal to correct the minute order was abuse of discretion where the minute order was intended to grant defendant complete relief from the default.

Order and judgment reversed with directions.

1. Attorney and client 🔑14

The practice of law should not be considered a game or a mere battle of wits but should be regarded as a means to promote justice.

2. Action 🔑66

It is the policy of the law that every case should be tried on its merits.

3. Courts 🔑116(3)
Judgment 🔑173

Where defendant's default was entered and thereafter default judgment was entered against defendant, and defendant within six months after entry of default filed notice of motion to set aside default judgment, and such notice and accompanying papers adequately apprised plaintiff that defendant was seeking complete relief from default, and minute order granting motion was intended to grant defendant such complete relief, refusal to correct minute order to conform to such intention was abuse of discretion, notwithstanding that notice of motion did not seek to set aside the default. Code Civ.Proc. §§ 473, 475.

Christin, Keegan & Carroll, and Charles A. Christin, all of San Francisco, for appellant.

Perry H. Taft, San Carlos, for respondent.

SCHOTTKY, Justice pro tem.

On March 31, 1949, respondent filed an amended complaint in the City and County of San Francisco to recover judgment against appellant for money had and received for the use of respondent. Service of summons was made upon appellants in the County of Los Angeles on April 11, 1949. Clerk's default was entered on May 13, 1949. On July 7, 1949, a default judgment was entered against appellant. On September 30, 1949 appellant served and filed a notice of motion to set aside the default judgment on the grounds of surprise, inadvertence and excusable neglect. With said notice appellant also served and filed his answer, the affidavit of his counsel, and his own affidavit in which appellant prayed for leave to plead to the complaint.

On October 24, 1949 the motion was heard and granted by the court and the following minute order was entered by the clerk: "In this action respective counsel being present, and the court orders the motion to set aside and vacate judgment by default be granted as to defendant, George Batchelor, said defendant to file bond in the sum of $3,000 within five days."

On November 17, 1949, counsel for appellant was served with an order to show cause why judgment should not be entered, and judgment forthwith issued against said bond on the ground that the default entered on May 13th had not been set aside.

On December 3, 1949 appellant served and filed a notice of motion to correct the said minute order and said motion and the order to show cause were heard by the court. On December 22, 1949 the court denied the motion to correct the minute order, ordered appellant's answer stricken from the files, ordered that judgment be entered against appellant and that execution issued upon appellant's cash bond. Judgment was accordingly entered and execution issued, and this appeal is from the order denying the motion to correct the minute order, the order granting the order to show cause why judgment should not be entered, and the judgment.

Appellant contends that under § 473 of the Code of Civ.Proc., when a motion to set aside a default judgment accompanied by a prayer to plead to the complaint is made before the default has become final, and is granted, but relief predicated upon the terms that petitioners file a bond substantially in the amount of the judgment prayed for in the complaint, the order implied that the default is likewise set aside so that the petitioner may plead to the merits.

Appellant quotes the portion of said § 473 which reads: "The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. *Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein,* otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken. * * * (Italics added.)" He argues that the requirement that a copy of the pleadings accompany the application for relief shows that the intention of the statute is to permit the petitioner to answer on the merits. He points out that the notice of motion filed in the instant case informed respondent that the motion would be based "on the affidavits of George Batchelor and Thomas J. Keegan and the answer of defendant George Batchelor, which papers are on file herein * * *;" and that the affidavit of appellant referred to the entry of the default, prayed that the judgment entered by default be vacated and that he be allowed to plead to said complaint.

Appellant relies strongly on the case of Weck v. Sucher, 96 Cal.App. 422, 274 P. 579. In that case a default was entered upon failure to answer and a default judgment was thereafter entered. Defendant filed a motion to set aside the judgment "upon the ground that said judgment was taken through mistake and surprise and excusable neglect", and filed affidavits in support thereof. After hearing the court made an order that the motion be granted and that "said judgment * * * is hereby set aside, annulled and vacated." The plaintiff appealed from such order. In its opinion affirming the judgment the court said 96 Cal.App. at page 426, 274 P. at page 581:

> "Further contention is made that the moving papers and the order based thereon relate exclusively to the matter of vacating the judgment rendered by the court, and consequently do not affect the default entered by the clerk. Plaintiff did not question the scope of the motion at the time it was presented and determined; the bill of exceptions reciting merely that he appeared and opposed the granting of the motion upon the grounds of an insufficient showing under section 473 of the Code of Civil Procedure. However, even assuming that he may do so now, we find no merit in the point because the terms of said motion and the contents of the documents attached thereto adequately apprised plaintiff that defendants were seeking to obtain complete relief under section 473 from the effect of their default, and in our opinion the order subsequently made by the court pursuant to said motion is legally sufficient, in form and substance, to grant such relief."

Respondent, in reply states that Weck v. Sucher "has no bearing on the issues herein because it involved a motion to set aside default rather than the more restricted notice of motion to set aside a default judgment involved in the instant case." We have examined the transcript in the cited case and find that respondent's statement is in error, and that the motion and order in that case were as hereinbefore set forth.

Respondent argues that "if a default has been entered and a default judgment has been rendered, two separate and distinct proceedings have occurred" and that "application for relief therefrom would consequently require a Notice of Motion reaching both the default itself and the default judgment."

Respondent cites the case of Title Insurance and Trust Co. v. King Land and Development Co., 162 Cal. 44, 120 P. 1066, which was a case in which appeals were taken from an order denying several motions of the appealing defendants to set aside a judgment and to relieve them from a default entered against them. The motion to set aside the judgment and default was made more than a year after the entry of the default and nearly 3 months after the entry of the judgment. The Supreme Court in affirming the order pointed out that more than 6 months had elapsed since the entry of the default and that said default could therefore not be set aside, and then stated that it would therefore be of no avail to set aside the judgment.

Respondent also cites Brooks v. Nelson, 95 Cal.App. 144, 272 P. 610, 611, which also was an appeal from an order refusing to vacate a default judgment. In that case the default of defendant was entered by the Clerk on November 29, 1924. On February 11, 1925 the defendants made a motion to set aside the default which was denied. On June 19, 1925, judgment by default was rendered by the court and on July 14, 1925 defendants made a motion, under § 475 of Code of Civ.Proc. to vacate and set aside the judgment which motion was denied. In affirming the order the appellate court said that the date of the entry of the default and not the entry of the judgment fixed the beginning of the 6 months within which application for relief for default must be made under said § 473, and that "Therefore, if the motion made on July 14, 1925, be considered a motion to vacate the default, as well as the judgment, it is clear that it was made too late.

"The setting aside and vacating the judgment alone, which was all the relief sought in said motion, would have been an idle act, because the default, entered on November 29, 1924, would have stood undisturbed. The default cut off defendants from making any further opposition or objection to the relief which plaintiff's complaint shows he is entitled to demand."

Prior to the oral argument counsel for respondent addressed a letter to the court calling attention to the recent case of Howard Greer Custom Originals v. Capritti, 35 Cal.2d 886, 221 P.2d 937, which also was an appeal from an order denying a motion to set aside a default judgment. In that case a default was entered against defendant and he then moved to set aside the default on the ground of "mistake and surprise." The motion was denied and judgment was rendered against him. He then filed notice of motion to have the judgment set aside upon the ground that it was taken against him "through inadvertence and surprise", and this motion was, after hearing, denied by the court. In affirming the order the Supreme Court said:

"The only order sought to be reversed by this appeal is the one denying defendant Capritti's motion to set aside the default judgment. Neither that motion nor this appeal is an attack upon the entry of default or the order refusing to set it aside.

"It is apparent that even if the judgment were now vacated, such action would be abortive. The entry of default, from which Capritti does not seek relief by this appeal, stands of record against him and entitles the Greer Company to a judgment upon its complaint."

The court then went on to quote the language hereinbefore quoted from Brooks v. Nelson.

It will be noted that in the first two cases cited by respondent the motion to set aside the judgment was made more than 6 months after the entry of the default, and in Brooks v. Nelson, supra, the motion to set aside the judgment was not only made more than 6 months after the default was entered, but was also made after an earlier motion to set aside the default had been denied. In the Greer case the motion to set aside the judgment was made and denied after a motion to set aside the default had been made and denied. Both motions were based on the same grounds. The appeal was from the order denying the motion to set aside the judgment and there was no appeal from the order denying the motion to set aside the default. We believe that each of these three cases is distinguishable on their facts from the instant case and that they are not determinative of the issue upon this appeal.

[1] We believe that the case of Weck v. Sucher, supra, is closely in point with the instant case. We believe that to use the language of that case, "the terms of said motion and the contents of the documents attached thereto adequately apprised plaintiff (respondent) that defendant (appellant) was seeking to obtain complete relief * * * from the effect of their default". We believe further that when the court ordered that the motion to set aside and vacate the judgment by default, and required that a bond in the sum of $3000 be filed by appellant the court intended to grant appellant complete relief from said default. Otherwise, it would appear that both the court and respondent were seeking to entrap appellant into filing a bond without any benefit to himself and to lull him into a sense of false security until the six months period from the entry of the default had expired. We are convinced that the court had no such intention but that the court after it had considered the affidavits in support of the motion intended to vacate the default along with the default judgment. And if respondent had any such intention and did not raise the point at the time the motion was heard, he should not be permitted to urge it now. The practice of the law should not be considered a game or a mere battle of wits but should be regarded as a means to promote justice. The law would indeed be impotent if a motion such as the one in the instant case made within the 6 months period, could be argued on the basis of whether or not appellant, because of surprise, inadvertence and excusable neglect should be relieved of his default, and then after said motion is granted by the court, as was done in this case, the plaintiff be permitted to have another judgment entered and deprive defendant of a trial upon the merits.

A situation somewhat similar in principle, occurred in the very recent case of Holden v. California Employment Stabilization Comm., 101 Cal.App.2d 427, 225 P.2d 634. The trial court had made a minute order on December 12, 1949, granting the motion to dismiss the petition for a writ of mandate but said minute order did not recite that it was to be followed by a formal order or judgment. On December 14, 1949, a formal judgment was entered. On December 16, 1949 petitioner filed his notice of appeal, the notice stating that the appeal was from the judgment entered on December 14, 1949. Since the minute order did not provide that it should be followed by a formal order or judgment the appeal should have been taken from the minute order and not from the judgment, and no valid appeal could be taken from the judgment. Gwinn v. Ryan, 33 Cal.2d 436, 438, 202 P.2d 51; Rules on Appeal, rule 2(b) (2). In holding that the appeal would be considered as an appeal from the minute order the court said at p. 482:

"Notices of appeal, of course, are to be liberally construed to permit, if possible, a hearing on the merits. It has been held that a misdescription of an 'order' as a 'judgment', or vice versa, will not invalidate a notice of appeal. (Seven Up etc. Co. v. Grocery etc. Union, 97 Cal.App.2d 623, 625, 218 P.2d 41; Crane v. Livingston, 98 Cal.App.2d 699, 220 P.2d 744; Kellett v. Marvel, 6 Cal.2d 464, 471, 58 P.2d 649.) An incorrect date in the notice of appeal will not necessarily invalidate it. (Title Guarantee & Trust Co. v. Lester, 216 Cal. 372, 373, 14 P.2d 297.) Even closer to the present case is Estate of Stone, 173 Cal. 675, 161 P. 258, where the notice of appeal referred to a 'judgment on the verdict' entered on a certain date, and the only appealable judgment was one of a later date—in fact, entered four days after the notice of appeal was filed. The court held 173 Cal. at page 677, 161 P. at page

258 that, although there was, as here, an incorrect designation of the proceeding appealed from and a wrong date, the appeal was effective.

"Rule 2(b) was intended to clarify the law for the benefit of practicing attorneys, not to constitute a trap for the unwary or inexperienced. Where it is perfectly apparent, as it is here, that appellant seeks a review of an order of dismissal, and where, as here, the notice of appeal is filed in ample time from either the entry of the order or judgment, and where as here, the notice of appeal is addressed to all respondents and to their attorneys so that no one is misled, and where, as here, no prejudice to respondents exists, the notice of appeal should be treated as being from the appealable order even if the notice incorrectly designates the 'order' as a 'judgment,' and erroneously gives the date of the entry of the judgment rather than that of the order. It is therefore held that the notice of appeal is effective as to all respondents."

[2] It is, of course, the policy of the law that every case should be heard on its merits, and as stated in Nicoll v. Weldon, 130 Cal. 666, 667, 63 P. 63, 64: "Section 473 * * * is a remedial provision, and is to be liberally construed, so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a substantial defense to the action an opportunity to present it."

[3] We are unable to understand how the trial court, after granting the motion of appellant as hereinbefore set forth, could grant an order to show why judgment should not be entered. We believe that under all the facts and circumstances of the instant case it was an abuse of discretion on the part of the trial court to grant such order to show cause and to refuse to correct its minute order to conform to the evident intent of granting appellant's motion to be relieved from the default judgment. To hold otherwise would not only in our opinion unreasonably subordinate substance to form and tend to make the law and rules of procedure ridiculous, but would be contrary to both reason and authority. We therefore hold that the trial court erred (1) in denying appellant's motion to correct its minutes, (2) in granting respondent's order to show cause why judgment should not be entered and (3) in entering said judgment.

The order appealed from, and the judgment, are reversed with directions to the trial court to permit the filing of appellant's answer.

NOURSE, P. J., and DOOLING, J., concur.

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102 Cal.App.2d 323

DOWNEY v. HUMPHREYS.

Civ. 17605.

District Court of Appeal, Second District,
Division 3, California.
Feb. 16, 1951.

Wallace K. Downey, as Insurance Commissioner of the State of California, and as Liquidator of International Reinsurance Corporation, brought an action against Thomas V. Humphreys, general agent of an insolvent insurance company, to recover unremitted insurance premiums. The Superior Court of Los Angeles County, Henry M. Willis, J., rendered a judgment adverse to the plaintiff and the plaintiff appealed. The District Court of Appeal, Vallée, J., held, inter alia, that evidence established that relationship between insurance company and defendant, before insurance company was adjudged insolvent and a receiver appointed, was that of debtor and creditor and not of trustee and beneficiary, so that defendant's only obligation with respect to premiums received by defendant was to pay liquidator the balance due insurance company after crediting himself with commissions on earned premiums and with unearned premiums after cancellation of policies, and that defendant was not obligated to remit unearned premiums, deducted only by commissions earned thereon.

Judgment affirmed.

1. Appeal and error 🔑927(3)

On appeal from judgment of non-suit plaintiff would be given the benefit of evidence which tended to sustain plaintiff's averments.

2. Insurance 🔑230

An "unearned premium" is that portion of a premium which has not been earned by reason of fact that policy has been cancelled, and is the premium for the unexpired term of policy.

See publication Words and Phrases, for other judicial constructions and definitions of "Unearned Premium".

3. Insurance 🔑42

Adjudication of insolvency of insurance company operated as a breach of its policies with insured.

4. Insurance 🔑42

Only upon entry of order directing liquidation of insolvent insurance company did liabilities of insurance company to its creditors, and claims against its debtors become fixed.

5. Insurance 🔑44

If relationship between insurer and its general agent was that of trustee and beneficiary, agent would not be permitted to set off unearned premiums in possession of agent against money agent owed insurer when insurer was adjudicated insolvent and receiver appointed for insurer, and agent would be obligated to remit unearned premiums, deducting only commissions earned thereon, but if relationship was that of debtor and creditor, agent's only obligation with respect to premiums received by agent was to pay liquidator balance due insurer after crediting himself with commissions on earned premiums and with unearned premiums after cancellation of policies. Insurance Code, § 1031.

6. Insurance 🔑44

A "debtor" is one who, by reason of an existing obligation, is or may become liable to pay money to another, whether such liability is certain or contingent. Civ. Code, § 3429.

See publication Words and Phrases, for other judicial constructions and definitions of "Debtor".

7. Insurance 🔑44

A "creditor" is one in whose favor an obligation exists, by reason of which he is, or may become, entitled to payment of money. Civ. Code, § 3430.

See publication Words and Phrases, for other judicial constructions and definitions of "Creditor".

8. Trusts 🔑1

A debt is not a trust and there is not a fiduciary relation between debtor and creditor as such.

9. Trusts 🔑30½(1)

If a person receives money and it is intention that he shall have unrestricted use thereof, being liable to pay a similar amount to a third person, a debt is created.

10. Principal and agent 🔑48

If funds held by an agent are commingled with knowledge and consent of his principal, in absence of an agreement to contrary, inference is that agent becomes a debtor to amount received for principal.

11. Insurance 🔑44

In action brought by liquidator of insurance companies to recover unremitted insurance premiums, evidence established that relationship between insurer and defendant general agent of insurer, before insurer was adjudged insolvent and receiver appointed for insurer, was that of debtor and creditor, and defendant was not obligated to remit unearned premiums, deducting only commissions earned thereon, as against contention that relationship was that of trustee and beneficiary so as to preclude defendant agent from setting off unearned premiums in possession of agent against money agent owed insurer when insurer was adjudged insolvent and receiver appointed for insurer. Insurance Code, § 1031.

12. Insurance 🔑80

Generally powers of an agent of insurance company are governed by general law of agency.

13. Insurance 🔑80

A general agent of an insurance company possesses such powers as have been conferred by company.

14. Insurance 🔑82

Any lawful claims of insurance agent arising out of agency by way of reimbursement, compensation, or interest may generally be deducted by agent from insurer's claim in rendering an account.

15. Insurance 🔑82

A general agent of insurer is not required to account to insurer for unearned premiums collected by agent after cancellation of policies by adjudication of insurer's insolvency where agent replaced such insurance in other companies.

16. Payment 🔑25

One who owes money to another on a written or other contract may meet its demands by setting off counter obligations arising on contract and existing in his own favor.

17. Set-off and counterclaim 🔑55

The debits and credits of a mutual account constitute cross-demands which are deemed to compensate each other.

18. Insurance 🔑44

The statute providing for proceedings against delinquent insurance companies, as amended to provide for set-off of mutual debts and mutual credits, was but enactment of prevailing rule. Insurance Code, § 1031.

19. Receivers 🔑69, 76, 169

A receiver occupies no better position than that which was occupied by party for whom he acts and receiver takes property and rights of one for whom he was appointed precisely in same condition and subject to same equities as existed before his appointment, and any defense, good against original party, is good against receiver.

20. Receivers 🔑75

Choses in action pass to a receiver of an insolvent subject to any right of setoff.

21. Set-off and counterclaim 🔑8(2)

The insolvency of a party against whom a setoff is claimed constitutes a sufficient ground for allowance of a setoff not otherwise available, and the right is to be determined by condition of things as they existed at moment party was adjudged insolvent.

22. Insurance 🔑82, 181

An insurance company cannot recover premiums for portion of term of insurance after insolvency has taken place, nor can it maintain an action against agent for recovery of premiums received by him, the consideration for which has thus failed.

23. Insurance 🔑44

Rights of insurance commissioner as liquidator of an insolvent insurance company became fixed on date of his appointment as liquidator and until such appointment he had no rights.

Fred N. Howser, Atty. Gen., Walter L. Bowers, Asst. Atty. Gen., for appellant.

Betts, Ely & Loomis, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff as liquidator of insurance companies from a judgment of nonsuit in an action against an agent to recover unremitted insurance premiums.

Independence Indemnity Company, a Pennsylvania corporation (referred to as Independence), for some time prior to November 1, 1931, Public Indemnity Company, a New Jersey corporation (referred to as Public), for some time prior to December 31, 1932, and International Reinsurance Corporation, a Delaware corporation (referred to as International), for some time prior to April 19, 1933, had been engaged in the insurance business in California. Defendant became general agent in California of Independence prior to 1929, of Public July 1, 1929, and of International about November 1, 1931.

The complaint alleged, and the answer admitted, that prior to April 19, 1933, all the assets and liabilities of Independence and Public were transferred to and assumed by International.

About November 1, 1931 (the exact date is not definitely fixed, but it is not material), Independence was "taken over" by International; that is, International acquired all of its assets and assumed all of its liabilities. Independence then ceased to function as a corporation. Thereafter International designated its Independence policies as "Independence Indemnity Underwriters, Division of International Reinsurance Corporation," and all business that had been and was thereafter written was the business of International. Defendant did not continue as agent of Independence after it was "taken over" by International; he dealt solely with International and was its general agent with respect to its Independence business.

On December 31, 1932, International "took over" Public; it acquired all of its assets and assumed all of its liabilities. Public then ceased to function as a corporation. Thereafter International designated its Public policies as "Public Indemnity Underwriters, Division of International Reinsurance Corporation," and all business that had been and was thereafter written was the business of International. After International "took over" Public, the latter's business was handled by International's method of doing business without regard to Public's contracts. Defendant did not continue as general agent of Public after it was "taken over" by International; he dealt solely with International with respect to the business of public; he was general agent of International with respect to its Public division; and he was under the jurisdiction of the Pacific Coast manager of International.

There was evidence that on July 1, 1929, defendant entered into a written general agency contract with Public which provided in part: "The General Agent shall collect and will be responsible for the payment of the premium on any policy, contract of insurance or suretyship, or renewal thereof issued by, through or on account of his agency, whether through agents, sub-agents, brokers, or otherwise, and all premiums, monies, securities, chattels or other property of whatever kind, received or collected by said General Agent shall be securely and honestly held by him subject to the instructions of the Company and while so held shall constitute a Fiduciary Trust to be used by the General Agent for no personal or other purpose inconsistent with such trust."

[1] The original contract was not produced. A copy which did not bear defendant's signature was introduced in evidence. One witness testified that defendant had signed the original. There was much evidence that defendant did not have a written contract with Public; that the arrangement was oral and that defendant would not and did not sign the original of the copy produced. As this is an appeal from a judgment of nonsuit, we must give plaintiff the benefit of the evidence which tends to sustain his averments, and assume that during the time he was general agent for Public—that is, until December 31, 1932,—defendant was working under the written contract. Mr. Dempsey, who was Pacific Coast manager of Independence until it was "taken over" by International, and vice-president and Pacific Coast manager of International thereafter, testified that after Public was "taken over" by International on December 31, 1932, regardless of how Public had handled its business, he merged it with International and handled it his own way; that he did not know how Public handled it; that he handled it "without regard to Public's contracts or even looking to see if there were any."

There was no evidence that defendant ever entered into a written contract with Independence or with International. The uncontradicted evidence was that he did not. Mr. Dempsey testified that at all times his (International's) arrangements with defendant were oral.

Defendant reported monthly—to Independance until it was "taken over" by International, thereafter to International with respect to Independence business, to Public until it was "taken over" by International, thereafter to International with respect to Public business—on what is called a "bordereau" or "account current," showing business written, premiums due, premiums collected, commissions allowable, unearned premiums, debits and credits, and net. He remitted to the companies between the 15th and 25th of the third month following the month in which the business was written. The amount due the companies from defendant was the premiums collected, less unearned premiums, less his commission. The companies "did not care" where defendant "got the money as long as he paid the premiums on policies written"; nor did they look to the policyholders for payment; they looked only to defendant. They required defendant to pay the premiums on insurance written if it was in effect 60 days; "didn't care whether he collected it [them] or not"; "depended on Mr. Thomas Humphreys for payment of the amount owing to the company, regardless of who the policy holders were, or when they paid"; the companies "depended upon the credit of Mr. Humphreys, and not upon anything else." If he extended credit to policyholders "that was his business." Mr. Dempsey testified that he did not consider money collected by defendant on policies "as a trust account."

[2] An unearned premium is that portion of a premium which has not been earned by reason of the fact that the policy has been cancelled; it is the premium for the unexpired term of the policy. When a policyholder cancelled a policy he looked to defendant for the unearned premium. The understanding and the course of business between the companies and defendant was that if there was a cancellation of a policy after a premium had been paid the policyholder would get back all of the unearned premium from defendant and the companies would credit him with the amount.

Defendant did not, and he was not required to, segregate the premiums collected on behalf of any of the companies (he was general agent for more than 20 insurance companies) in a separate account or as trust funds. With the knowledge and consent of the companies, he deposited premiums collected from all companies he represented and his personal funds in his general commercial account, and paid money owing to the companies from that account. Bills sent to policyholders were sent on defendant's billheads, without the name of any insurance company.

In March, 1933, because of rumors as to the financial instability of International, defendant told Mr. Dempsey, "I think the company is going to blow." Dempsey replied, "I'll tell you what you do: We will know this in a little while. You can hold back the December premiums. * * * It will give you just that much more money to replace if they do blow, but I don't think they are going to."

On April 19, 1933, International was adjudged insolvent and receivers were appointed by the Court of Chancery, County of New Castle, Delaware. The record is not at all clear, but apparently on the same day a receiver of International was appointed by the superior court of the county of Los Angeles and a temporary restraining order issued restraining International and its attorneys, agents and employees from transacting any further business. The order was served on a vice-president of International on April 20, 1933. It was not served on defendant. He did not learn of the appointment of the receiver until some time in May, 1933. The uncontradicted evidence was that he did not hear of the restraining order. On June 28, 1933, plaintiff was appointed liquidator of International by the superior court of the county of Los Angeles, and on July 24, 1933, of Independence and Public by the superior court of the city and county of San Francisco.

Prior to April 19, 1933, defendant had issued a number of policies of insurance in International, Independence and Public and had collected $13,539.94 in premiums from such policyholders which he did not remit. Prior to April 19, 1933, he issued a number of policies in these companies and after April 19, 1933, collected $5,177.51, premiums on the policies which he did not remit.

On April 19, 1933, defendant learned of the appointment of the receivers in Delaware. He testified that he did not do any further business for International. On the same day, he replaced all of the existing policies which he had written in International, Independence, and Public by getting other companies "to accept the coverage blanket" and within 15 days wrote new policies. He used the $13,539.94 which he had on hand on April 19, 1933, and the $5,177.51 which he collected thereafter, in replacing the insurance. In addition to these moneys, he used $6,000 of his own funds in purchasing the new policies. The money which he used to replace the insurance, other than that contributed from his personal funds, was unearned premiums which he had received on policies that had been written about three or four months before that time.

On May 15, 1933, defendant received a notice from the Delaware receivers suggesting "that all insurance be replaced in other companies at the earliest possible date." [1]

The action is by the liquidator to recover the $18,717.45 ($13,539.94 plus $5,177.51), which defendant did not remit. A jury was empaneled to try the cause.

Plaintiff, in proving his case, established that on April 19, 1933, defendant had in his possession unearned premiums in the amount of $24,944.35. In his answer defendant alleged that he was authorized and entitled to and did offset these moneys against moneys due by him. Plaintiff's proof showed that on April 19, 1933, $18,717.45 was due from defendant to International and that after setting off the unearned premiums of $24,944.35, there was a balance due defendant of $6,226.90. Defendant did not press his claim for the balance in this action.

The trial court concluded that there was no evidence that defendant "occupied the status of trustee" on April 19, 1933; that the evidence showed without conflict that the relationship was that of debtor and creditor; that defendant was the creditor on that date; and that he had a right to offset unearned premiums in the amount of $24,944.35 against plaintiff's claim of $18,717.45.

Plaintiff's position at the trial was: "It is our position that the thirteen thousand-odd dollars collected prior to April 19th, a good part of it was unearned and it is returnable to the policy holders, yes. But the policy holder, he has a claim against the company and not against Mr. Humphreys. He is entitled to file a claim and to share on the same basis as every other claimant That is our position. So it makes no difference whether or not the thirteen thousand-odd dollars is earned or unearned so far as Mr. Humphreys is concerned, because it is the liquidator who is supposed to pay the claimant and not Mr. Humphreys. That is our position in this throughout. As far as the $5,100 is concerned, we are entitled only to that amount which is earned. If any part of it was unearned, we are not entitled to that." In answer to the court's inquiry, he also stated:

"The Court: * * * Here is Independence Indemnity and Public Indemnity. Are they distinguishable from International, or does International just absorb both of those?

"Mr. Doherty: [Counsel for plaintiff] International, as we understand it—and I think Mr. Betts agrees—absorbed both. Independence was carried as the Independence Indemnity Division of International, but Public was absorbed entirely, if I understand the situation." The statement was correct. See In re International Reinsurance Corporation, 271 N.Y. 381, 3 N.E.2d 518, 519.

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[1] "To agents of International Re-Insurance Corporation, including Independence Division and American Mine Owners Division.

"The International Re-Insurance Corporation was placed in the hands of the undersigned as Receivers under an Order of the Court of Chancery of the State of Delaware in and for New Castle County, dated April 19, 1933.

"This affects policies issued by: International Re-Insurance Corporation; Independence Indemnity Company; Public Indemnity Company; and Underwriters Casualty Company.

"That the appointment was made due to the fact that the Corporation was insolvent in that it was unable to meet its current and maturing obligations; that by the appointment of said Receivers the liability of International Re-Insurance Corporation upon all of its policy contracts and reinsurance or assumption agreements was terminated as of the 19th day of April, 1933. It is, therefore, suggested that all insurance be replaced in other companies at the earliest possible date.

"We are giving this information to you in order that you may be advised and act for the best interests of yourself and customers. It must be understood that no expense can be incurred for the account of the Receivers in replacing any insurance as the Receivers cannot take any steps to replace the insurance or provide any funds for such replacement."

Plaintiff here contends that the relationship between defendant and the companies was that of trustee and beneficiary; that the moneys sued for belonged to the liquidator; that the defendant did not have a right of offset; and that the evidence of defendant's liability was sufficient to require denial of the motion for judgment of nonsuit. Defendant contends that the evidence, giving plaintiff the benefit of every reasonable inference therefrom, shows without conflict that on April 19, 1933, he was agent of International only; that the relationship was that of debtor and creditor; and that he had a right of offset.

[3, 4] The adjudication of the insolvency of International on April 19, 1933, operated as a breach of its policies (including those of Independence and Public) with its insured. Garrison v. Edward Brown & Sons, 25 Cal.2d 473, 482, 483, 154 P.2d 377. The proceeding in which receivers of International were appointed in Delaware did not work a dissolution of, nor was it for the purpose of liquidating, the corporation. In re International Reinsurance Corporation, Del.Ch. 48 A.2d 529, 539. It was not until June 28, 1933, that an order was made in California for its liquidation. Only upon the entry of the order directing its liquidation did International's liabilities to its creditors and claims against its debtors become fixed. Garrison v. Edward Brown & Sons, supra, 25 Cal.2d 473, 482, 154 P.2d 377.

[5] If the relationship of defendant to International on April 19, 1933, was that of trustee and beneficiary, defendant would not be permitted to set off unearned premiums, for a fiduciary cannot set off claims owed by him in his personal capacity against obligations that he assumes as a trustee. If defendant was trustee of the premiums collected, he would be obligated to remit them, deducting only commissions earned thereon. Garrison v. Edward Brown & Sons, supra, 25 Cal.2d 473, 477, 154 P.2d 377; Garrison v. Edward Brown & Sons, 28 Cal.2d 28, 32, 168 P.2d 153. If, however, the relationship of defendant to International on April 19, 1933, was that of debtor and creditor, his only obligation with respect to premiums received by him on policies of International (including those of Independence and Public) was to pay the liquidator after his appointment on June 28, 1933, the balance due International after crediting himself with commissions on earned premiums and with unearned premiums after cancellation of policies. In Garrison v. Edward Brown & Sons, supra, 28 Cal.2d 28, at page 32, 168 P.2d 153 at page 155, the court said: "That result [whether deductions could be made from premiums due the company] depended on the character of the fund representing the collected premiums, that is, whether that fund was held by the defendant as fiduciary under the agreement, or in a debtor-creditor relationship pursuant to the claimed modification of the original agreement."

[6–10] A debtor is one who, by reason of an existing obligation, is or may become liable to pay money to another, whether such liability is certain or contingent. Civ. Code, sec. 3429. A creditor is one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money. Civ.Code, sec. 3430. A debt is not a trust and there is not a fiduciary relation between debtor and creditor as such. If a person receives money and it is the intention that he shall have the unrestricted use thereof, being liable to pay a similar amount to a third person, a debt is created. Rest.Trusts, sec. 12, Comments b, g; Preston & McKinnon v. Brennan, 135 Cal. 55, 66 P. 981. If funds held by an agent are commingled with the knowledge and consent of his principal, in the absence of an agreement to the contrary, the inference is that the agent becomes a debtor to the amount received for the principal. (Rest.Agency, sec. 398, Comment c. See also Id. sec. 72, Comment e.) There was no evidence from which an inference could be drawn that after Independence and Public were "absorbed" by International the relationship between International and defendant was that of trustee and beneficiary. As will appear, the relationship was that of debtor and creditor.

[11] The evidence is without conflict that Independence was "absorbed" by International about November 1, 1931, and that thereafter defendant was the agent of International as to all business of Independence. The evidence is also without conflict that Public was "absorbed" by International on December 31, 1932. There is no evidence that after International "took over" Public defendant continued with International under the written contract he had had with Public. The evidence is without conflict that after December 31, 1932, defendant was the agent of International as to all business of Public, not under the former contract, but under an oral understanding between International and himself. On April 19, 1933, defendant was the agent of International only. The evidence is uncontradicted that from December 31, 1932, there was but one company—International—doing business with defendant; that there was no written contract between International and defendant; that Mr. Dempsey, in complete charge of Independence's former business, of Public's former business, and of International's business, did not know how Public handled its business, and that he did business with defendant without regard to or knowledge of Public's written contract, and solely on the oral understanding between himself and defendant. Again the evidence is uncontradicted that defendant was obligated to return unearned premiums to policyholders in case of cancellation of policies, and that with the approval of the companies he at all times made such payments. Under the oral understanding between International and defendant, the latter was bound to remit between the 15th and 25th of the third month the amount due from policyholders on business written by him which had been in effect 60 days whether received by him or not. At the time the policies were issued the amount due was the full premium. The defendant, however, was given time within which to make payments to International. Under the understanding, the amounts to be paid to International by defendant, on cancellation of policies, were the earned premiums and not the unearned premiums. It is clear that if policies were cancelled in the ordinary course of business, defendant was credited with unearned premiums and was not liable therefor, and that the understanding, and the only understanding, between International and defendant was that their cross-claims should mutually compensate each other. International looked to the credit of defendant alone. The earned premiums, whether collected by defendant or not, were debts due from defendant to International. International's relationship with defendant under their agreement was, therefore, that of debtor and creditor. Wallace v. American Life Ins. Co., 116 Or. 195, 237 P. 974, 976; Rhode Island Mut. Liability Ins. Co. v. Pierce, R.I., 171 A. 243; Horton v. Eagle Indemnity Ins. Co., 86 N.H. 472, 171 A. 322, in which it was said at page 325: "When the insurer has taken the agent's credit as payment for the premium, the effect of the statute is to entitle the agent to credit with the insurer for the amount of the return [unearned] premium"; Kelly v. American Mine Owners' Casualty Corporation, 161 Va. 206, 170 S.E. 580.

Plaintiff argues that there is evidence of a written contract between Independence and defendant because defendant, on May 22, 1933, filed an action to collect the premium on a policy which he alleged had been written by him as general agent for Independence, for which he became liable to Independence in accordance with the general agency contract between himself and Independence. The inference sought to be drawn from the existence of a written contract is that a fiduciary relationship existed between Independence and defendant. The suit was on a policy which had been cancelled on March 29, 1933. The allegation does not say that there was a written contract. The fact alleged does not establish either that there was a written contract with Independence or with International, nor is it evidence of the relationship between International and defendant on April 19, 1933.

Plaintiff relies on asserted admissions in defendant's answer in the present case and allegations of the complaints in two actions brought by defendant to recover earned premiums as evidence that Independence and Public continued to do business after they were taken over by International. We find nothing in these pleadings inconsistent with the uncontradicted evidence that after Independence and Public were "taken over" their business was that of International. Plaintiff overlooks the fact that he alleged that prior to April 19, 1933, "all of the assets and liabilities of" Independence and Public "were transferred to and assumed by International," and that he repeatedly represented to the trial court that prior to that date Independence and Public had been "absorbed" by International. He cannot here contend otherwise.

It is suggested that because in 1933 Penal Code, section 506b provided: "An insurance agent * * * who * * * with the intention to fraudulently convert to his own use * * * appropriates, or otherwise uses or applies any money * * * received by him as such agent * * * contrary to the instructions or without the consent of the company * * * shall be guilty of embezzlement", it must be held that respondent was acting in a fiduciary capacity. The section is not relevant. There is no evidence that respondent acted "contrary to the instructions or without the consent of the company". The evidence is to the contrary.

[12–17] As a general rule, the powers of an agent of an insurance company are governed by the general law of agency. A general agent possesses such powers as have been conferred by the company. Frasch v. London & Lancashire F. Ins. Co., 213 Cal. 219, 223, 2 P.2d 147. Any lawful claims of an agent arising out of the agency by way of reimbursement, compensation, or interest may generally be deducted by the agent from the principal's claim in rendering an account. Arnold v. San Ramon Valley Bank, 184 Cal. 632, 635, 194 P. 1012, 13 A.L.R. 320; Denny v. Scoonover, 93 Ind. App. 118, 153 N.E. 779, where the facts are similar to those in the present case; Wallace v. American Life Ins. Co., 116 Or. 195, 237 P. 974, 976; J. L. Riley & Co. v. London Guaranty & Accident Co., 27 Ga.App. 686, 109 S.E. 676, 677; 3 C.J.S., Agency, § 168, p. 59. A general agent is not required to account to the insurer for unearned premiums collected by the agent after cancellation of the policies by an adjudication of the insurer's insolvency where the agent replaced such insurance in other companies. Union Mut. Casualty Ins. Corp. v. Insurance Budget Plan, 291 Mass. 62, 195 N.E. 903, 98 A.L.R. 1422; German-American Ins. Co. v. Tribble & Pratt, 86 Mo.App. 546, 554. "There can be no dissent from the doctrine that one who owes money to another on a written or other contract may meet its demands by setting off counter obligations arising on contract and existing in his own favor." Automobile, etc., Co. v. Salladay, 55 Cal.App. 219, 226, 203 P. 163, 166. See Code Civ.Proc., sec. 440. The debits and credits of a mutual account constitute cross-demands which are deemed to compensate each other. Hart v. Cooper, 47 Cal. 77; Jones v. Mortimer, 28 Cal.2d 627, 170 P.2d 893.

[18] At the time International was adjudicated insolvent, April 19, 1933, and at the time the liquidator was appointed, June 28, 1933, the statute providing for proceedings against delinquent insurance companies was silent as to the right of setoff. Stats. 1919, p. 265, as amended Stats.1933, p. 1420. In 1935 the statute was amended to provide for setoff of mutual debts and mutual credits. Stats.1935, p. 544, Insurance Code, § 1031. The statute was based on the New York law and was but the enactment of the prevailing rule. New York Title & M. Co. v. Irving Trust Co., 241 App.Div. 246, 271 N.Y.S. 775, 778; Commonwealth v. Shoe & Leather Dealers' Insurance Company, 112 Mass. 131, 135; Newman v. Hatfield Wire & Cable Co., 113 N.J.L. 484, 174 A. 491, 494. The Bankruptcy Act provides for a setoff of mutual debts and mutual credits. 11 U.S.C.A. § 108.

[19-21] A receiver occupies no better position than that which was occupied by the party for whom he acts. "He takes the

property and rights of the one for whom he was appointed precisely in the same condition and subject to the same equities as existed before his appointment, and any defense, good against the original party, is good against the receiver." People v. California etc. Trust Co., 168 Cal. 241, 246, 141 P. 1181, 1183, L.R.A.1915A, 299. Choses in action pass to a receiver of an insolvent subject to any right of setoff. It is well settled that the insolvency of a party against whom a setoff is claimed constitutes a sufficient ground for the allowance of a setoff not otherwise available. The right is to be determined by the condition of things as they existed at the moment the party was adjudged insolvent. If the right of setoff was available to defendant at that time the insolvency of International did not defeat it. People v. California etc. Trust Co., 168 Cal. 241, 246, 250, 141 P. 1181, L.R.A.1915A, 299; Machado v. Borges, 170 Cal. 501, 150 P. 351; In re Bank of San Pedro, 11 Cal.2d 313, 315, 316, 79 P.2d 1057; Pendleton v. Hellman Commercial etc., Bank, 58 Cal.App. 448, 208 P. 702; City Investment Co. v. Pringle, 73 Cal.App. 782, 789–792, 239 P. 302; Henderson v. Electric Loop Land Co., 96 Cal.App. 576, 581, 583–587, 274 P. 445; 22 Cal.Jur. 437, sec. 14, et seq. The fact that the policyholders received their unearned premiums did not create an unlawful preference. Scott v. Armstrong, 146 U.S. 499, 511, 13 S.Ct. 148, 36 L.Ed. 1059, 1063; New York Title & M. Co. v. Irving Trust Co., 241 App.Div. 246, 271 N.Y.S. 775, 778.

[22] In the following cases a setoff of unearned premiums was allowed against an insolvent company or its receiver or liquidator. Carr v. Hamilton, 129 U.S. 252, 9 S.Ct. 295, 32 L.Ed. 669; Scott v. Armstrong, 146 U.S. 499, 13 S.Ct. 148, 36 L.Ed. 1059; Smith v. Binder, 75 Ill. 492, held insured had action against agent for unearned premiums; Franzen v. Hutchinson, 94 Iowa 95, 62 N.W. 698, 699; Smith v. National Credit Ins. Co., 65 Minn. 283, 68 N.W. 28, 33 L.R.A. 511; Newman v. Hatfield Wire & Cable Co., 113 N.J.L. 484, 174 A. 491, 494; Johnson v. Button, 120 Va. 339, 91 S.E. 151, 153, in which, quoting from 22 Cyc. 1404, it was said, p. 153: "A company cannot recover premiums for the portion of the term of insurance after insolvency has taken place. Nor can it maintain an action against an agent for the recovery of premiums received by him, the consideration for which has thus failed." See New York Title & Mortgage Co. v. Irving Trust Co., 268 N.Y. 547, 198 N.E. 397, and same case below, 241 App.Div. 246, 271 N.Y.S. 775. See also 44 C.J.S., Insurance, § 134(g), p. 758.

[23] On April 19, 1933, defendant had a legal right to set off unearned premiums against the amount he owed International. The fact that a receiver of International had been appointed did not affect that right. The unearned premiums belonged to the policyholders. Neither the receiver nor the liquidator had any better right than International, upon its adjudication as insolvent, to the unearned premiums, and International had none. The domiciliary receivers approved the action of defendant in replacing the insurance. Replacing the insurance and the setoff had been effected before plaintiff's appointment as liquidator. Plaintiff had no rights until the date of his appointment, June 28, 1933. It was on that date that his rights and powers became fixed. Garrison v. Edward Brown & Sons, supra, 25 Cal.2d 473, 482, 154 P.2d 377. Plaintiff had no rights retroactively. In the Garrison case, 25 Cal.2d 483, 154 P. 382, the court said: "*After the appointment of a liquidator,* who may take possession of all assets of the insolvent insurance company, it was the duty of the agent to remit funds in his hands to the liquidator for the purposes of liquidation." (Italics added.)

Disregarding conflicting evidence, giving plaintiff's evidence all the value to which it was legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, the trial court was justified in finding, as a matter of law, that there was no evidence of sufficient substantiality to support a verdict in favor of plaintiff.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

102 Cal.App.2d 395

CITY OF ANAHEIM et al. v. CITY OF FULLERTON et al.

MEISER v. CITY COUNCIL OF CITY OF ANAHEIM et al.

Civ. 4162, 4163.

District Court of Appeal, Fourth District, California.

Feb. 19, 1951.

Rehearing Denied March 20, 1951.

Hearing Denied April 19, 1951.

Mandamus proceeding by the City of Anaheim, a municipal corporation, and others, against the City of Fullerton, a municipal corporation, and others, to prevent taking of further steps in annexation proceedings by the defendant city, and certiorari by Henry G. Meiser against the City Council of the City of Anaheim, a municipal corporation, and others, to compel council to desist from further proceedings in annexation proceedings by the City of Anaheim. The mandate and certiorari proceedings were consolidated and heard together. The Superior Court of Orange County, Franklin G. West, J., rendered judgment that City Council of Anaheim acted without and in excess of its jurisdiction in carrying through certain annexation proceedings, and declared proceedings void and the City Council of Anaheim appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained findings that two separate annexation proceedings were used by the City of Anaheim, in order to annex certain property, which could not otherwise be annexed as uninhabited territory and for purpose of barring proceedings all ready started by the City of Fullerton.

Judgment affirmed.

1. Quo warranto ⚷5

Where city ordinances, approving annexation of certain territory to city, did not become effective until June 9, but city clerk forwarded certified copies of ordinances to secretary of state on June 6, and writ of certiorari to require city to desist from proceedings was filed June 9, there was neither actual nor a de facto exercise of dominion over annexed land prior to issuance of writ and quo warranto proceedings were not exclusive remedy for testing validity of annexations, and certiorari was a proper remedy. Gen. Laws, Act 5159; Act 5162, §§ 1 et seq., 8, 10, 17.

2. Municipal corporations ⚷33(1, 8)

Repealed statute, in effect that time of city's annexation proceedings, providing that no municipal annexation proceeding should be complete until clerk had filed in county recorder's office an affidavit stating that all requirements of law had been complied with, was applicable to annexation proceedings even though another statute provided that when certified copy of ordinance was filed in office of secretary of state, annexation would be deemed complete, and that no other statute should apply to such proceeding, and as additional requirement was not complied with, certiorari was proper remedy to review city's annexation proceedings. Gen. Laws, Act 5159; Act 5162, §§ 1 et seq., 8, 10, 17; Act 5163.

3. Municipal corporations ⚷33(9)

In certiorari proceeding to compel city to desist in annexing certain territory as uninhabited territory, in two separate annexation proceedings, evidence sustained finding that two separate proceedings were used in order to annex a large block of territory which could not otherwise be annexed as uninhabited territory, and also for purpose of barring proceeding previously started by another city, by taking shorter and quicker steps permitted by annexation of Uninhabited Territory Act. Gen Laws, Act 5159; Act 5162; Act 5163.

4. Municipal corporations ⚷33(1)

Where proceeding to annex certain territory to city was actually started prior to time that defendant city began two separate annexation proceedings under Annexation of Uninhabited Territory Act, any claim of priority for proceedings by defendant city based on fact that petition could be filed in less time under provisions of annexation of Uninhabited Territory Act, was unavailable where entire proceedings were void because used to annex inhabited territory as uninhabited territory and act was never intended to be used to circumvent and evade act for annexation of inhabited territory. Gen.Laws, Act 5159; Act 5162, §§ 1 et seq., 3; Act 5163.

◆

Preston Turner, S. B. Kaufman, Robbie Kaufman and McFadden, Turner & Owens, all of Anaheim, for appellants.

C. R. Allen, City Atty., Lloyd S. Verry, Fullerton, June E. Blodget, L. W. Blodget, Santa Ana, for respondents.

BARNARD, Presiding Justice.

These causes involve annexation proceedings respecting lands, lying between Fullerton and Anaheim, along Spadra Road (Highway 101) which runs north and south, and along Orangethorpe Avenue, which runs east and west about 600 feet south of the Fullerton city limits, crossing Spadra Road at right angles.

On September 11, 1948, a proceeding was started under the Annexation Act of 1913, as amended, Deering's Gen.Laws, Act 5159, to annex to Fullerton a strip 660 feet wide and 3800 feet long, extending south from the Fullerton city limits to a point 675 feet north of the Anaheim city limits, and including Spadra Road with 300 feet on each side. A notice of intention to circulate a petition was published on that day, and an affidavit of publication was filed with the city clerk on September 15. On September 28, the Fullerton city council adopted a resolution approving the intention to circulate that petition, and the petition was received by the city clerk on October 14.

In the meantime, a petition was filed with the city clerk of Anaheim on September 18, pursuant to the Annexation of Uninhabited Territory Act of 1939, Deering's Gen.Laws, Act 5162, seeking to annex to Anaheim a strip 30 feet wide and 4150 feet long, lying immediately south of Orangethorpe Avenue and extending from the Anaheim city limits, at its east end, to a point across Spadra Road and west of the land in volved in the Fullerton proceeding. On September 18, the Anaheim city council purported to adopt a resolution designating this as the Orangethorpe Annexation and fixing a time for protest. On September 25, the same two petitioners filed another petition seeking to annex to Anaheim a strip 60 to 80 feet wide and about 3100 feet long, running from the south line of Orangethorpe Avenue to the Anaheim city limits. This strip consisted of Spadra Road only for the south third of its length, that road and ten feet on the west for another third, and the road and ten feet on each side for the northerly third. For most of its distance it ran through the exact center of a portion of the property covered by the Fullerton proceeding. On September 25, the Anaheim city council purported to adopt a resolution designating this as the South Spadra Annexation and fixing a time for protest. On October 4, further proceedings under the two resolutions were enjoined by an alternative court order which was made peremptory on March 29, 1949.

On March 30, 1949, the Fullerton city council passed a resolution in connection with that proceeding, setting April 19 as the day for hearing protests and declaring an intention to call an election. On April 19, it heard and determined that there were no protests and passed a resolution calling an election for June 7, 1949. On June 7 such an election was held, 20 votes being cast, 17 for and three against annexation.

On March 29, the Anaheim city council passed a resolution again acknowledging receipt of the Orangethorpe and Spadra petitions on September 18 and 25, and ordering that they be considered at the next meeting. On April 12, it passed a resolution fixing the time for hearing protests against the Orangethorpe Annexation and also passed a resolution fixing the time for hearing protests against the South Spadra Annexation. On April 29, the time fixed therefor, the Anaheim city council met and heard protests against both of those proceedings. In the Orangethorpe proceeding it was determined that the protests were insufficient. The hearing in the South Spadra matter was partly heard and continued to May 3, when it was determined that the protests were insufficient. On May 10, the Anaheim city council passed Ordinance 742 approving the Orangethorpe

Annexation, and also Ordinance 743 approving the South Spadra Annexation. Each of these ordinances, which were signed by the Mayor and certified by the clerk on May 11, provided that it should become effective thirty days "from and after its final passage." On June 6, 1949, proir to their effective date, the city clerk forwarded certified copies of these ordinances to the secretary of state. On June 9, 1949, the secretary of state issued certificates certifying that these ordinances, respectively, were filed in his office on June 9, 1949. On June 6, 1949, an alternative writ of mandate was issued on the application of the city of Anaheim commanding the city of Fullerton to take no further steps in its annexation proceeding other than to canvass the returns of the election and to record the results thereof. On June 9, 1949, a writ of certiorari was issued directing the city council of Anaheim to return a transcript of all proceedings in connection with the Orangethorpe and South Spadra Annexations, and to desist from further proceedings in the matters to be reviewed.

The mandate and certiorari proceedings were consolidated and heard together. The court found the general facts as above stated and further found that the property in the Orangethorpe Annexation proceeding, consisting of a strip of land 30 feet wide and 4150 feet long, is contiguous to the Anaheim city limits only at its easterly end for a distance of 30 feet; that the property described in the South Spadra Annexation is contiguous to the Anaheim city limits at its southerly end for a distance of 60 feet, being the width of Spadra Road at said junction; that the two (Anaheim) petitions were each signed by only two petitioners who own larger parcels at the intersection of Orangethorpe Avenue and Spadra Road, a part of the land of each petitioner being included in each of those petitions; that the proposed Orangethorpe Annexation and South Spadra Annexation "in essence and in fact were a single proceeding"; that said proceedings "circumvent, evade and avoid the intent and meaning" of the statutes of this state relative to the annexation of uninhabited territory, in that inhabited territory which was thus sought to be annexed to Anaheim was thereby divided into two parcels "each of which in itself was found by said city council to be inhabited by less than twelve (12) qualified electors, but which taken together in one parcel was found to be inhabited by more than twelve (12) resident, qualified electors"; that said territory was and is inhabited territory and said proceedings were a part of a subterfuge and illegal scheme and plan whereby Anaheim sought to annex property inhabited by twelve or more qualified electors by dividing the property into more than one parcel, each containing less than twelve qualified electors; that said petitions were signed and said actions, resolutions and ordinances were taken, passed and adopted as parts of one proceeding, contrary to law and without or in excess of the jurisdiction of the Anaheim city council, and for the purpose of preventing the registered voters residing on the property, portions of which they sought to annex, from voting upon the question of such annexation; that while the Anaheim city council found and determined that there were eighteen qualified electors residing on the parcels of property, portions of which were sought to be annexed to Anaheim, eight on the Orangethorpe Annexation property and ten on the South Spadra property, there were in fact not less than 32 qualified voters residing on the combined property, eight on the part included in the Orangethorpe Annexation and 24 on the part included in the South Spadra Annexation; and that none of the areas proposed to be annexed to Anaheim under either of those petitions were separately assessed but each was merely a portion of a larger parcel, and the Anaheim city council computed the value of such portion of each parcel by dividing the assessed value by the square footage of the larger parcel and multiplying the result by the square footage of the area proposed to be annexed.

The court further found that these Anaheim proceedings were designed and intended to surround and enclose certain property by a strip of land 30 feet wide on the north and ten feet wide on a part of the west and by the adjacent street on the balance of the west, and by the city limits of Anaheim on the other two sides in order to prevent the owners of such surrounded property from annexing their property to Fullerton without in any manner bestowing any benefits on such surrounded property or the owners thereof; that no further proceedings have been taken by the city of Anaheim subsequent to the receipt of certificates from the secretary of state; and that the affidavits of completion referred to in Chapter 472 of the Statutes of 1939, Gen.Laws, Act 5163, have not been filed.

As conclusions of law, the court found that the petitions filed and presented to the city council of Anaheim were filed and presented as a part of an illegal plan and scheme of avoiding and circumventing the laws of this state relative to the annexation of inhabited territory to a municipal corporation, and for the further purpose of preventing the residents and registered voters of the territory involved from voting on the question of the annexation of such territory to the city of Fullerton; that all acts, resolutions, findings of fact and ordinances passed or adopted by the city council of Anaheim in this connection were passed or adopted in furtherance of and as a part of the same plan and scheme to evade and circumvent the requirements of the applicable laws, and were and are in essence a part of one proceeding and illegal and void; that in receiving the two petitions and adopting the resolutions and ordinances above referred to the city council of Anaheim acted in excess of its jurisdiction and in violation of the Annexation Act of 1913 and the Annexation of Uninhabited Territory Act of 1939, as amended; and that the proceedings purported to be carried through as the Orangethorpe Annexation and the South Spadra Annexation by the city of Anaheim are, and each is, null and void. Judgment was entered adjudging and decreeing that the city council of Anaheim has acted without and in excess of its jurisdiction and in violation of law, in carrying through these annexation proceedings, and declaring that each of these proceedings is null and void. This appeal followed.

It is first contended that since these annexations to Anaheim had been completed their validity could be tested only by *quo warranto* proceedings, under the rule announced in Crowl v. Board of Trustees, 109 Cal.App. 214, 292 P. 985, and that certiorari is not the proper remedy. It is argued that section 10 of Act 5162 provides that when a certified copy of the ordinance is filed in the office of the secretary of state the annexation is deemed complete, that the municipal corporation was then exercising dominion over the annexed land in at least a de facto capacity, and that section 17 of Act 5162 provides that said act, and no other, shall apply to such a proceeding.

[1] Section 8 of that act provides that "Immediately upon an ordinance approving the annexation becoming effective," the clerk shall transmit a certified copy of it to the secretary of state. Section 10 provides that from and after the date of the filing of this document in the office of the secretary of state the annexation shall be deemed to be complete. These ordinances did not become effective until June 9, but the clerk forwarded certified copies thereof on June 6. The provisions of the statute were not followed, and an attempt to shorten by several days the time fixed by the established procedure clearly appears. In the natural course of events, and had the statute been followed, these documents would not have been filed with the secretary of state until after June 9 when the writ of certiorari was issued. As it was, the documents were filed the same day the writ was issued, there could have been neither an actual nor a de facto exercise of dominion over the annexed land by the city of Anaheim prior to the issuance of the writ, and the reasons for applying the usual rule were not here present.

[2] Moreover, Chapter 472 of Statutes of 1939, Deering's Gen.Laws, Act 5163, was adopted eight days after Act 5162 and became effective on the same day. It

covered all proceedings for the annexation of territory to a municipal corporation, and provided that no such proceeding shall be complete until the clerk has filed in the county recorder's office an affidavit stating that all requirements of law have been complied with, together with a map showing the change in boundaries, and further provides that the filing of this affidavit shall not be considered in lieu of any requirement in any annexation proceeding but shall be considered as an additional requirement. While that act was repealed in 1949, it was in force at the time here in question. We think that the provisions of Act 5163 were applicable here in spite of the provisions of section 17 of Act 5162, and that an additional requirement was thus provided for which was not complied with. Under the circumstances here appearing, certiorari was a proper remedy.

It is next contended that the court erred in finding that the South Spadra Annexation was inhabited territory since the court erroneously admitted evidence bearing on that question. It is argued that in reviewing the proceedings in order to determine whether the city council had exceeded its jurisdiction the court was limited to the record in those proceedings, which showed that this territory was uninhabited and that further evidence could not be received. The rule relied on by the appellants, that such a review is limited to the record and that evidence dehors the record and contradicting it is not permitted, is subject to the qualification that no question of fraud is raised. Such a question was here raised and was inferentially and in practical effect found by the trial court, although the findings did not use the word "fraud". The record of the proceedings in the city council showed that the council found that there were eighteen qualified electors involved in these two proceedings, eight on the Orangethorpe Annexation and ten on the South Spadra Annexation, and the trial court found that there were at least thirty-two such voters involved in the two proceedings. The point here raised is immaterial if the annexation of these properties was unreasonably and unlawfully divided into two proceedings.

It is next contended that the Orangethorpe and South Spadra Annexation proceedings were not unreasonable or unlawful. It is argued that in People ex rel. Peck v. City of Los Angeles, 154 Cal. 220, 97 P. 311, and other cases, the annexation of narrow strips has been approved and the rule firmly established that the shape and extent of a strip of land sought to be annexed to a city is entirely a political matter and not one for the courts to decide.

In People ex rel. Peck v. City of Los Angeles, 154 Cal. 220, 97 P. 311, 313 while the court said that the shape and extent of the area to be annexed was a matter for the people to decide, it also said that the courts would interfere "where some substantial provision of the law has been violated or where fraud was perpetrated in the matter of the boundaries or the extent of the annexed district." Both of these situations here appear. It may well be doubted whether the rule contended for may be so extended as to apply to the narrow strips here in question, which could not be used for any legitimate purpose, with the possible exception of a portion of Spadra Road. It is unnecessary to decide this question here.

It is next contended that the Orangethorpe and South Spadra Annexation proceedings were separate proceedings which did not evade the law. It is argued that the court's findings to the contrary are erroneous because no such issue was raised in the pleadings and because they are not supported by the evidence.

The contention that this issue was not raised by the pleadings is erroneous. The matter was sufficiently raised in the allegations of the petition for the writ, and the cause was largely tried on that theory.

The controlling question was, and is, whether the two Anaheim proceedings are in essence and effect one proceeding, which for reasons of subterfuge and evasion was carried through as two proceedings. In

People v. Town of Ontario, 148 Cal. 625, 84 P. 205, 212, it is said: "If the 'territory' proposed to be annexed, regarded as a whole may fairly be said to be inhabited, the proceedings must be had under the (Inhabited Territory Act)". In People v. City of Lemoore, 37 Cal.App. 79, 174 P. 93, 94, in discussing the question as to whether a parcel is inhabited or uninhabited the court said: "The fact of occupancy is not limited, manifestly, to the space occupied by the building or buildings, but extends to every portion of the single tract of which that space is an undivided part." That case quoted from Wild v. People ex rel. Stephens, 227 Ill. 556, 81 N.E. 707, 708, "The use of that strip (in that case 50 feet) * * * is a mere subterfuge, and not a compliance with the law."

[3, 4] The intention in this case, as in most cases, must be drawn from the surrounding facts and the acts of the parties, and the entire record supports the court's conclusion in this regard. The Anaheim proceedings were started about a week after notice was published in the Fullerton proceeding. While separate petitions were filed in those proceedings a week apart, and acted upon by the city council the same day they were filed, those resolutions were declared void by court order. New resolutions were then adopted on the same day, and all subsequent acts in the two proceedings were taken at the same time and they were carried through together. There were too many voters for one proceeding and it may reasonably be inferred that separate petitions, by the same landowners, were filed for this reason. The only inference reasonably to be drawn from the facts, as a whole, is that two separate proceedings were used in order to annex at the same time a narrow strip of property, along the north and west sides of a large block of land, which could not otherwise be annexed as uninhabited territory; and also for the purpose of barring the proceeding already started by the city of Fullerton, by taking the shorter and quicker steps permitted by the Annexation of Uninhabited Territory Act. An attempt to evade the purport and intent of the statutes in this connection clearly appears, and the court's findings and conclusions are amply sustained by the record. Some contention is made that the Anaheim proceeding had priority over the Fullerton proceedings because the petitions were received by the Anaheim council before the petition was received by the Fullerton council. After having been enjoined from proceeding under the resolutions first adopted the Anaheim city council purported to again proceed, on March 30, 1949, under the original petitions filed on September 18 and 25. This would seem to be a further evasion and violation of the spirit and intent of the law since section 3 of Act 5162 provides that when such a petition is filed the city council must "without delay" pass a resolution giving notice of such proposed annexation. Whether or not that be true, the Fullerton proceeding was actually started first, and any claim of priority for the Anaheim proceedings, based on the fact that a petition can be filed in less time under the provisions of the Annexation of Uninhabited Territory Act, is unavailable where the entire proceedings are void. That act was never intended to be used to circumvent and evade the act for the annexation of inhabited territory.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur

102 Cal.App.2d 270

PEOPLE v. TEMPLE et al.

Cr. 4450.

District Court of Appeal, Second District,
Division 2, California.

Feb. 14, 1951.

Hearing Denied March 15, 1951.

Charles P. Temple and others, were charged with an offense and Theodore Sandroff was convicted of criminal conspiracy to cheat and defraud by criminal means and of grand theft in the Superior Court of Los Angeles County, Stanley N. Barnes, J., and the defendant appealed and in addition appealed from an order denying motion for new trial. The District Court of Appeal, McComb, J., held that defendant was not convicted upon the uncorroborated testimony of an accomplice, that alleged trial errors did not require a reversal and that the motion of defendant for new trial for newly discovered evidence was properly denied.

Judgment and order affirmed.

1. Criminal law 🔑511(1)

In prosecution for conspiracy to cheat and defraud by criminal means and for grand theft by defendant through a scheme with a weighmaster of a steel company to issue fictitious weight tickets for steel purchased by the company, evidence did not establish that defendant was convicted upon the uncorroborated testimony of the weighmaster who was his accomplice. Pen. Code, § 1111.

2. Criminal law 🔑511(2)

Testimony of an accomplice need not be corroborated as to every fact to which he testifies but it is sufficient if the corroborating evidence tends to connect defendant with the commission of the offense. Pen.Code, § 1111.

3. Criminal law 🔑1159(2, 4)

Questions as to weight of evidence and credibility of witnesses are for the trial court.

4. Criminal law 🔑1159(2)

Function of an Appellate Court is performed when record discloses evidence aside from that of the accomplice which tends to connect defendant with the commission of the crime. Pen.Code, § 1111.

5. Criminal law 🔑342

In prosecution for conspiracy to cheat and defraud by criminal means and grand theft by a scheme of defendant with a weighmaster of a steel company to issue fictitious weight tickets for steel purchased by the company, evidence of defendant that there had been trouble between him and his partner which culminated in defendant's trying to get money out of the partnership by using fictitious weight tickets and that such was the reason for what he had done was properly excluded as irrelevant.

6. Criminal law 🔑448(1)

Where accomplice of defendant on cross-examination testified that he knew that a civil action by company defrauded was pending against him and that company was waiting the outcome of the criminal proceedings answers were properly stricken on the ground that they were a conclusion of the witness.

7. Criminal law 🔑419(10)

Where accomplice of defendant was asked on cross-examination if some one connected with the criminal proceeding had told him that the company defrauded was awaiting the outcome of the criminal case to learn what to do with the civil case, testimony was properly excluded as calling for hearsay testimony.

8. Criminal law 🔑1170½(3)

Defendant could not complain of a ruling on a question to which an objection was sustained or where the question was subsequently withdrawn.

9. Criminal law 🔑382

Where question to accomplice of defendant called for immaterial testimony an objection thereto was properly sustained.

10. Criminal law 🔑670

Where a question to which an objection is sustained does not itself indicate that the answer will be favorable to the party seeking to introduce testimony, before ruling will be reviewed on appeal, an offer of what is proposed to be proven, must first be made to the trial court so that reviewing court may determine whether evidence would be beneficial to the party offering it.

11. Criminal law 🔑670

A defendant could not complain of ruling sustaining objection to a question where the question did not indicate that the answer would be beneficial or material to defendant nor was any offer of proof made.

12. Criminal law 🔑511(3)

Under the Penal Code respecting corroboration of an accomplice, evidence of circumstances is sufficient corroboration of the testimony of the accomplice. Pen.Code, § 1111.

13. Criminal law 🔑780(3)

Instruction that corroboration of testimony of accomplice may not be supplied by testimony of one or more other accomplices but must come from "other evidence of circumstances" or from testimony of one or more witnesses who are not accomplices was not erroneous because of the quoted phrase. Pen.Code, § 1111.

14. Criminal law 🔑770(1)

It is not the theory which the prosecution advances nor the theory which defendant adopts which governs the court in the giving or the refusing to give instructions.

15. Criminal law 🔑814(3)

Theories are of value in a criminal case only to the extent that they are supported by substantial evidence.

16. Criminal law 🔑814(3)

In prosecution for conspiracy to cheat and defraud a steel company and for grand theft by a scheme between defendant and weighmaster of the company in the use of fictitious weight tickets for steel purchased by the company, instruction that indictment was based on certain theories was properly refused under the evidence.

17. Criminal law 🔑829(1)

Refusing instruction was not error where the subject matter thereof was fully covered by another instruction.

18. Criminal law 🔑660

Generally, defendant in a criminal prosecution, waives objection to court's erroneous remarks where he neither moves to strike such remarks nor requests court to admonish jury to disregard the remarks.

19. Criminal law 🔑1035(3)

Where defendant made no objection to the remarks of the trial judge nor did he assign them as misconduct nor request that jury be instructed to disregard them, complaint thereof could not be made on appeal.

20. Criminal law 🔑1144(15)

Appellate Court must assume that jury followed an admonition by the trial judge to disregard any reference that he had made which would indicate that he thought defendant had committed a crime.

21. Criminal law 🔑730(1)

Instructions by the court to the jury were adequate and removed any prejudicial effect of the district attorney's argument with respect to punishment that might be imposed on defendant.

22. Criminal law 🔑721½(1)

Where wife of defendant was a codefendant in the trial and was acquitted, references of the prosecution to failure of the wife to testify which were made in regard to her as a defendant, and where no remarks were made as to what effect her failure to testify had on defendant, were not error.

23. Criminal law 🔑721½(1)

Prosecution may comment on failure of wife of defendant who was tried with him and was acquitted to explain or deny by her testimony any evidence or facts in the case against her.

24. Criminal law 🔑1037(1, 2), 1044

Claim of prejudicial argument of the district attorney would not be considered where defendant did not move to strike, object to nor ask the court to admonish the jury to disregard the argument.

25. Criminal law 🔑1037(1, 2)

Generally, any objectionable argument of prosecutor must be objected to at the time it is made and the court instructed to admonish the jury concerning it before the alleged error may be urged on appeal.

26. Criminal law ⚿939(1)

New trial for newly discovered evidence was properly denied where there was no showing of diligence by defendant to secure the new evidence which was available to defendant at all times.

◆

Bernard Brennan, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Gilbert Harelson, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

This appeal is from a judgment of guilty of (1) criminal conspiracy to cheat and defraud by criminal means, and (2) 24 counts of grand theft. There is also an appeal from the motion denying a new trial.

Facts

The evidence disclosed principally through a witness Temple, an admitted accomplice of defendant, that the Bethlehem Pacific Coast Steel Corporation purchased its scrap metal through brokers, among whom were A–1 Iron and Metal Company, Eastern Iron and Metal Company and J. Levin & Sons.

When a driver of a truck loaded with scrap metal entered the Bethlehem company's gate he was required to stop and register with the guard on the gate. The records of the Bethlehem Company showed the broker through whom the driver was selling the metal, the license number of the truck, and the time the driver entered the plant as well as the time he left. After the driver was registered in at the gate he proceeded to the scale house where the truck was weighed to obtain the gross weight of the truck which was registered on the scale ticket. He then proceeded to the scrap yard where the scrap was unloaded with a magnetic crane. After unloading he went back to the scale house where the truck was weighed to obtain its weight after being relieved of its cargo.

The weighmaster then subtracted the empty weight from the gross weight to obtain the net weight of the metal. This information was transferred to a weight voucher in triplicate, the scale ticket being in duplicate. After these two records were completed the original of the scale ticket, the original of the weight voucher, together with the gate pass were given to the driver of the truck. At the gate he surrendered the pass and was registered out. The independent driver then took the weight tickets back to the broker who gave him a check for the amount of scrap set forth on the tickets. The following morning the weighmaster forwarded the duplicate of the scale ticket to the accounting department and the yellow copy of the weight voucher to the purchasing department.

Within about 10 days after delivery of scrap the broker was reimbursed for money paid the individual junk dealers. In addition the broker was paid a commission of fifty cents a ton.

The scales upon which the trucks were weighed at the Bethlehem Company were manipulated by hand so that it was possible to report a weight other than the true weight of the load. The scale ticket would register a weight that had been manipulated by hand. Since the office of the Bethlehem Company is open five days a week, weights recorded on Saturday could at the weighmaster's discretion be dated to be included in the business of the preceding Friday or the following Monday.

Mr. Charles P. Temple, from the latter part of 1946 through September, 1947, was acting as weighmaster at the Bethlehem scale house. Defendant was a partner in the A–1 Iron and Metal Company.

In February, 1947, defendant approached Mr. Temple asking him to issue fictitious weight tickets. In return for the issuance of such tickets to defendant, Mr. Temple received $1,970 in installments over a period of time. A scheme was worked out whereby defendant could unlawfully take money from Bethlehem Pacific Coast Steel Corporation. Mr. Temple, the weighmaster, at defendant's request issued fictitious weight tickets and gave them to defendant. These tickets carried the names of the drivers who had purportedly delivered the scrap to Bethlehem on which the tickets were based. The tickets also purported to show the name of the broker through whom the scrap was purchased.

Defendant took all the fictitious tickets upon which A-1 appeared as broker and had one Gagnon, buyer for A-1, issue a check for them in the name of the purported driver. Defendant cashed all these checks. Defendant gave all the fictitious tickets which showed Levin & Sons or Eastern Iron and Metal Company as brokers to Joseph Cohen. Cohen took these tickets to those brokers and obtained checks made out in the names of the purported drivers shown on the tickets. Either defendant or Cohen cashed all the checks of Levin & Sons and of Eastern Iron and Metal, but the proceeds all went to defendant. Some time later Bethlehem would issue its check also based upon these fictitious tickets to the broker whose name appeared on the ticket. In reality the scrap for which Bethlehem issued its check was never delivered.

The guards posted at the Bethlehem gates at all times during the period of February, March, April and May, 1947, testified that the name of every truck driver who brought scrap into the yard appeared on the gate record without exception.

All the Bethlehem checks issued to A-1 Iron and Metal Company, Eastern Iron and Metal Company and Levin & Sons were cashed and the Bethlehem accounts at the banks on which the checks were drawn were debited. The brokers on all the tickets issued by Temple during the months of January, February, March and April, 1947, were A-1 Iron and Metal Company, Eastern Iron and Metal Company and J. Levin & Sons. L. Tate was the driver's name shown on the tickets issued for A-1 Iron and Metal Company. He testified that he never authorized defendant to endorse his name on any checks and that he never delivered a load of scrap to Bethlehem Pacific Coast Steel Corporation.

A handwriting expert testified that the name L. Tate appearing on the checks introduced in evidence, wherein L. Tate was named as payee, was written by defendant. Similar evidence was introduced in support of each count in the indictment.

Defendant's Contentions

[1] First: *Defendant was convicted upon the uncorroborated testimony of his accomplice, Temple.*

This proposition is untenable. Temple's testimony that no scrap was brought in for the fictitious tickets is corroborated first by the guards and gate records of Bethlehem Steel. There were six guards posted at the gate of Bethlehem during the time the crimes were committed and each of these testified that the name of every truck driver who brought a load of scrap metal appeared on the gate record. The names Tate, Butler, Cohen and Gold do not appear on the gate records of Bethlehem on the dates upon which the scrap was supposed to have been delivered and each of the parties testified that they did not deliver the scrap set forth on the tickets to Bethlehem.

Further corroboration is found in the testimony of witness Nolan who said that defendant came through the Bethlehem gates three times on April 23, and received tickets 638, 645, 646 and 653. The fictitious tickets issued by Temple on April 23, were tickets 640, 641, 1521 and 1444. Mr. Nolan testified that the only A-1 drivers who came through with a load of scrap on April 23rd were Mr. Felix whose load was rejected and a Mr. J. Thomas who delivered a load for A-1 but who received tickets 657 and 658. This evidence establishes with reference to the date of April 23 that neither defendant nor any of his drivers actually delivered any one of the four loads set forth on the fictitious tickets issued by Temple.

In addition defendant testified that he instructed Temple to issue the tickets in the names of Cohen, Tate, Butler and Gold, and admitted that Temple's testimony was correct in such respect. He also admitted that he received personally from Temple all the fictitious tickets, and that Mr. Temple's testimony was correct in that regard. He likewise testified that he took the tickets issued by Temple in the name of Tate and gave them to Mr. Gagnon, buyer for A-1 and had him make out checks in the name of Tate and that he then endorsed the checks and received the proceeds. He also admitted having received the proceeds from all the checks which were issued on the basis of the tickets issued by Temple in the names of Butler, Gold and Cohen.

[2] The only respect in which defendant's testimony did not corroborate Mr. Temple's is wherein defendant stated that Bethlehem received the scrap represented on the tickets. Conceding that this portion of Mr. Temple's testimony was not corroborated, still there was sufficient corroboration of the accomplice's testimony to meet the requirements of section 1111 of the Penal Code.* It is not necessary that the testimony of the accomplice be corroborated as to every fact to which he testifies. It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense. (People v. Yaeger, 194 Cal. 452, 473, 229 P. 40; People v. Griffin, 98 Cal.App.2d 1, 219 P.2d 519.)

It is clear that the evidence set forth above other than that of the accomplice Temple tends to connect defendant with the commission of the offenses as charged and constituted corroborative evidence of the accomplice's testimony.

[3, 4] Questions as to the weight of the evidence and the credibility of the witnesses are for the trial court. The function of an appellate court is performed when the record discloses evidence aside from that of the accomplice which tends, as in the instant case, to connect defendant with the commission of the crime. (People v. Henderson, 34 Cal.2d 340, 346. 209 P.2d 785.)

[5] Second: *The trial court erred in refusing to permit defendant to present evidence as to his mental condition as an element to be considered by the jury to determine the weight and credibility to be given to defendant's testimony.*

This contention is also devoid of merit. On defendant's direct examination the following occurred:

"Q. By Mr. Neeb: Did you ever have any discussion with Mr. Temple concerning the giving to you of these tickets, these vouchers or any tickets or any vouchers for trucks that did not arrive at Bethlehem?

"A. No. The only discussion I had with Mr. Temple on this matter was using the fictitious name on these loads that arrived at the Bethlehem plant.

"Q. All right. Now, at that point, Mr. Sandroff, what was the reason—withdraw that. Did you have a reason for using the name of 'Tate' or 'Gold,' 'Butler' or 'Cohen' on these tickets?

"A. Yes, I wanted to get the money out of the partnership and keep it for myself.

"Q. Prior to doing this had there been any trouble between you and Williams?

"Mr. Brandler: Now, just a moment—

"The Witness: Yes, there was.

"The Court: Just a moment, the answer may go out."

Defendant then offered to prove that there had been a long period of trouble beteween defendant and his partner culminating in defendant's trying to get money out of the partnership by using fictitious tickets and that this was the reason for doing what he had done.

Such evidence was clearly irrelevant and immaterial to any issue pending before the court. Defendant's reasons or motives for performing an unlawful and criminal act are neither relevant nor material to any of the issues as to whether he had in fact committed such act or acts.

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[*] Section 1111 of the Penal Code reads: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

People v. Taber, 13 Cal.App.2d 27, 55 P.2d 1189, is clearly distinguishable from the facts in the present case. In the cited case the prosecution introduced evidence to show that defendant had employed one Bush to represent Rose who was charged with burning a building. This evidence was introduced for the purpose of corroborating the testimony of Rose and connecting defendant with the conspiracy and the arson. Defendant in the Taber case offered evidence to show his reasons for employing Bush to represent Rose, which evidence was rejected, the court holding that this was error in such case. Defendant was not allowed to explain his reason for doing the acts.

In the instant case the evidence introduced by the prosecution showed that Mr. Temple at defendant's request issued 76 fictitious tickets. Defendant was allowed to explain by stating that his reason was to enable him to get money from the partnership for himself without his partner's being aware of it. In this case defendant was allowed to explain his acts while in the Taber case he was not.

[6, 7] Third: *The trial court erred in refusing to permit evidence that the testimony of the prosecution's witnesses was biased and prejudiced.*

This contention is not sound. On cross-examination of the witness Temple, he testified that he knew that a civil action by Bethlehem was pending against him and that Bethlehem was waiting for the outcome of the criminal proceeding. His answers were stricken on the ground that it was a conclusion of the witness. This ruling was correct. He was then asked if some one connected with the criminal proceeding had told him that Bethlehem was waiting for the outcome of the criminal case to learn what to do with the civil case. An objection to this question was properly sustained on the ground that it called for hearsay testimony. He was then asked if any one had asked him about it and an objection to this question was sustained on the ground that it was too speculative, whereupon defendant's counsel withdrew the question.

[8, 9] Clearly defendant may not complain of the ruling in view of the fact that the question was withdrawn. The witness was asked to tell where he got the information about the Bethlehem civil case's depending upon the outcome of the criminal case. An objection to this question was properly sustained on the ground that it was immaterial.

[10] The law is established that where a question to which an objection is sustained does not itself indicate that the answer will be favorable to the party seeking to introduce the testimony, before the ruling will be reviewed on appeal an offer of what is proposed to be proven must first be made to the trial court so that the reviewing court may determine whether the evidence would be beneficial to the party offering it. (People v. Ratten, 39 Cal.App.2d 267, 270, 102 P.2d 1097.)

[11] In the present case the question did not indicate that the answer would be beneficial or material to defendant, nor was any offer of proof made.

There is no merit in defendant's contention that he was not permitted to show the bias and prejudice of the witness Nolan. The record discloses that Nolan was examined relative to his knowledge of a civil suit pending against defendant and that motions to strike such testimony were denied.

Fourth: *The trial court erred in instructing the jury as follows:*

"The corroboration of the testimony of an accomplice required by law may not be supplied by the testimony of one or more other accomplices, but must come from *other evidence of circumstances* or from the testimony of one or more witnesses who were not accomplices." (Emphasis added.)

The foregoing is a copy of instruction No. 823 contained in California Jury Instructions, Criminal, page 649. Defendant contends that the underscored portion of the above instruction is contrary to the language of section 1111 of the Penal Code which provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense *or the circumstances thereof* * * *" (Emphasis added.)

Defendant claims that the court charged the jury that evidence of circumstances was sufficient corroboration, whereas the code clearly states evidence of circumstances is entirely insufficient corroboration.

[12, 13] The correct interpretation of the Penal Code section is that evidence of circumstances is sufficient corroboration of the testimony of an accomplice. Such evidence tends in the instant case to connect defendant with the commission of the offense.

Fifth: *The court erred in refusing to give the following instructions requested by defendant:*

(a) "You are instructed that Count I of the indictment is a charge of conspiracy and the prosecution has elected to rely upon two different theories.

"One theory is that there was a conspiracy to commit grand theft by accepting payments for truck loads of scrap that were not delivered to Bethlehem.

"The second theory is that there was a conspiracy to receive payment for loads of scrap which were overweight at Bethlehem."

[14, 15] This proposition is likewise without merit. It is not the theory which the prosecution advances nor the theory which the defense adopts which governs the court in the giving or the refusing to give instructions. Theories are of value in a criminal case only to the extent they are supported by substantial evidence. (People v. Wright, 167 Cal. 1, 4, 138 P. 349.)

[16] In the present case there is no evidence that the conspiracy to cheat and defraud was based only on overweights as contended by defendant. In stating that the only evidence introduced at the trial to substantiate the charge of conspiracy to cheat and defraud was that of the witness Duerden, who testified that he had given defendant overweight credit for scrap steel not delivered by him, defendant fails to take cognizance of the conspiracy between Mr. Temple and himself which was also one to cheat and defraud. The refusal of the instruction was not error.

(b) "You are instructed that you are to disregard the testimony of the witness Spencer Duerdon because his testimony related only to the charge of a conspiracy to cheat and defraud by giving extra weight and there is no corroboration of such a charge."

[17] The refusal to give this instruction was not error for the reason that the subject matter thereof was fully covered by the following instructions given at defendant's request:

"You are instructed that so far as Count I is concerned, the testimony of Spencer Duerden can be considered by you only upon the question of whether or not there was any conspiracy to cheat and defraud Bethlehem Steel Company."

"The testimony of Spencer Duerden is not sufficient, even if believed by you, to support the charge of a conspiracy to cheat and defraud by means of receiving *extra weight* on loads of scrap delivered by Theodore Sandroff to Bethlehem Steel Company."

Sixth: *The trial court was guilty of prejudicial misconduct during the trial.*

This proposition is untenable. After defendant on direct examination had stated that he wanted to get money out of the partnership and keep it for himself, the following occurred:

"Q. By the Court: In other words, what you are saying, Mr. Sandroff, is that you were willing to take this money from the partnership but you didn't take it from Bethlehem; is that it?

"A. That is correct.

"The Court: Well,—

"Mr. Neeb: Your Honor, I think that counsel would probably argue that there was no reason for this, and I think I should be permitted to show that there was.

"The Court: I don't know of any rule that permits a man to get on the stand and say why he committed a crime.

"Mr. Neeb: Well, let me ask him this:

"Q. Mr. Sandroff, did you feel that when you wrote on the back of these checks a name other than your own, that you were committing any offense?

"Mr. Brandler: Just a moment.

"The witness: No.

"Mr. Brandler: That is a question of law for the Court, and the jury to determine, not for this witness.

"The Court: Not what he feels is not a question of law, but it is immaterial. Is it any defense that he thinks he didn't commit a crime, if he committed a crime? He just said he was willing to take the money from his partner.

"Mr. Neeb: There is a legal question whether there can be any crime insofar as financial arrangements between partners is concerned.

"The Court: I am going to sustain it as immaterial. I don't know of any rule that permits a self serving statement by an individual that he had a reason for committing the crime.

"Mr. Neeb: Your Honor, may I ask, with all due respect to your Honor, that the jury may be instructed not to heed your Honor's remark that there has been any crime committed?

"The Court: Well, that of course is immaterial, whether there was or wasn't. The jury is admonished to disregard any inference from anything the Court has stated as to whether or not a crime has or has not been committed with which the defendant is here charged."

[18] Defendant may not here urge error in the court's comment for the reason that it is the general rule that a defendant in a criminal prosecution waives objection to the court's erroneous remarks where he neither moves to strike such remarks nor requests the court to admonish the jury to disregard the alleged prejudicial remarks. (People v. O'Brand, 92 Cal.App.2d 752, 756, 207 P.2d 1083.)

[19] In the present case defendant made no objection to the remarks of the trial judge nor did he assign them as misconduct, nor request that the jury be instructed to disregard them. Therefore the foregoing rule is here applicable.

[20] Even though defendant did not comply with the above rule, the trial judge did admonish the jury to disregard any reference that he had made which would indicate that he thought defendant had committed a crime, and we must assume that the jury followed such admonition. (People v. Horowitz, 70 Cal.App.2d 675, 694, 161 P.2d 833.)

Seventh: *The district attorney committed prejudicial misconduct during the course of his argument to the jury.*

This contention is also untenable.

(a) During his argument to the jury defendant's counsel made the following statement:

"* * * if it shall become the practice in our courts of these United States, not only just to bring parties in and place them in the shadow of the penitentiary upon that kind of evidence, but if it should become the rule that men or women would be deprived of life or liberty upon that kind of evidence, * * *"

Thereafter in the district attorney's final argument he said: "Now, with reference to the argument of Mr. Neeb, the matter of punishment is not a matter for the determination of the jury. And I believe the court will so instruct you, that that is a matter that the court must ultimately decide upon. Mr. Neeb, however, in his effort to prevail upon your sympathies, mentioned something about the matter of the punishment of Mr. Sandroff, and only by reason of that statement of Mr. Neeb's, which is in the record in this case, dealing with the subject matter of punishment, I feel impelled to discuss that matter for just a moment.

"Now, I caution you again, of course, that the matter of punishment is not a matter for your decision or your determination. That rests exclusively with the court. What did Mr. Neeb say in his final argument, among the very final words, for the purpose of prevailing upon your sympathies? Mr. Neeb says that 'The District Attorney in this case would place the defendant Sandroff in the shadow of the penitentiary.' Those are his words. I took them down myself.

"Now, as far as the matter of punishment, I say again that is not a question for you jurors to determine. But in the event that you jurors return a verdict of guilty as to the defendant Sandroff, there is no assurance, no guarantee, there is no rule of law by which the court's hands are tied so that the court has no other alternative but to sentence Mr. Sandroff to the penitentiary. The matter of the punishment, as far as the defendant Sandroff, would rest entirely in the sound discretion of Judge Barnes after a review and analysis of all facts and circumstances. The court could, if the court saw fit—and of course, we don't know what the action of the court would be—the court could, if the court saw fit, place the defendant Sandroff on probation."

Upon defendant's objecting to the district attorney's comment the court said to the jury: "The jury will be instructed at the proper time that the matter of punishment is of no moment and should not be considered by them in any way in determining the guilt or innocence of any of the defendants."

Thereafter the jury was instructed thus: "In arriving at a verdict in this case the subject of penalty or punishment is not to be discussed or considered by you, as that matter is one that lies solely with the court and other governmental agencies, and must not in any way affect your decision as to the innocence or guilt of the defendants."

[21] The court's instructions to the jury were adequate and removed any prejudicial effect of the district attorney's argument.

[22] (b) Defendant also contends that it was reversible error for the district attorney to make reference to the failure of defendant's wife to take the witness stand. She was a codefendant in the trial and was acquitted. The record shows that the references of the prosecution to the failure of defendant's wife to testify were made in regard to her as a defendant and no remarks were made as to what effect her failure to testify had on defendant.

[23] It was proper for the prosecution to comment on her failure to explain or deny by her testimony any evidence or facts in the case against her. (People v. Adamson, 27 Cal.2d 478, 487 et seq., 165 P.2d 3.)

People v. Heacock, 10 Cal.App. 450, 456, 102 P. 543, relied on by defendant, is not here applicable for in the cited case defendant's wife was not a codefendant, and the remark as to her failure to take the witness stand and testify was made not in reference to her but with reference to her husband, the defendant.

[24] (c) Defendant's claim that the district attorney committed prejudicial error in making reference in his argument to defendant's connection with his partnership will not be considered for the reason that defendant did not make a motion to strike, object to or ask the court to admonish the jury to disregard such reference.

[25] It is the general rule that any objectionable argument of the prosecuting attorney must be objected to at the time it is made and the court requested to admonish the jury concerning it before this alleged error may be urged on appeal. (People v. Codina, 30 Cal.2d 356, 362, 181 P.2d 881.)

[26] Eighth: *The court erred in denying defendant's motion for a new trial on the ground of newly discovered evidence.*

This proposition is without merit. Defendant claimed that after the trial he discovered a number of Bethlehem weight vouchers and scale tickets which were material to his defense. There is no showing of due diligence upon the part of defendant to secure the alleged newly discovered evidence. During the course of the trial the prosecuting attorney made the following statement to defendant's counsel, "All of those scale tickets, gate records, and weight vouchers are all available to you, Mr. Neeb, as well as other counsel."

It thus appears that the evidence was available to defendant at all times and that he did not show on his motion for a new trial due diligence in discovering the alleged newly discovered evidence. Therefore the trial judge in denying the motion on such ground acted properly. (People v. Yankee, 79 Cal.App.2d 431, 437, 179 P.2d 582.)

The judgment and order are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

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102 Cal.App.2d 408

PROTEX-A-KAR CO. v. HARTFORD ACCIDENT & INDEMNITY CO. et al.

Civ. 17927.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1951.

Rehearing Denied March 9, 1951.

Protex-a-Kar Co. brought action against Hartford Accident and Indemnity Company, Underwriters at Lloyds, London, and the Troy Company, for declaratory relief determining plaintiff's rights under three policies of products liability insurance issued by the first two named defendants, wherein the defendant Troy Company filed a cross-complaint. From adverse judgment of the Superior Court of Los Angeles County, Henry M. Willis, J., the plaintiff and the cross-complainant appealed. The District Court of Appeal, Wilson, J., held that where products liability policies issued to manufacturer of antifreeze compound each contained provision limiting recovery to accidents occurring "during the policy period", insurer could not be held liable for accidents occurring after policy had been cancelled by insurer as authorized under the policies, even though accidents resulted from use of the product which had been sold during period policies were effective.

Judgment affirmed in part and reversed in part with directions.

1. Insurance 🔑146(3)

Any uncertainties or ambiguities in terms of an insurance policy are to be construed most liberally in favor of insured.

2. Insurance 🔑146(1)

In absence of ambiguity, a contract of insurance must be interpreted according to the object and intention of parties as expressed in the policy, in light of circumstances surrounding its execution.

3. Insurance 🔑146(1)

Each clause of insurance contract must be considered with reference to every other clause upon which it has any bearing and all the provisions are to be construed together for purpose of ascertaining intent of the parties.

4. Insurance 🔑236

Where policies of products liability insurance issued to manufacturer of antifreeze compound each contained provision limiting recovery to accidents occurring "during the policy period", insurer could not be held liable for accidents occurring after policy had been cancelled by insurer as authorized under policy, even though accidents resulted from use of the product which had been sold during period policies were effective.

5. Insurance 🔑146(2)

Where language of insurance policy is clear and unambiguous, its plain and unequivocal terms cannot be disregarded to make a new contract for the parties.

6. Insurance 🔑229(1)

Where primary and excess products liability policies issued to manufacturer of antifreeze compound each contained provision requiring that notice of cancellation be given to company marketing the antifreeze, insurer's attempted cancellation of the policies without giving required notice was ineffective as to company marketing the antifreeze, notwithstanding that such company had knowledge of purported cancellation through insured.

Hibbard & Kleindienst, Los Angeles, for appellant.

Eugene S. Ives, Los Angeles, for cross-appellant, Troy Company.

James V. Brewer, Los Angeles, for respondent Hartford Accident & Indemnity Co.

Crider, Runkle & Tilson, Los Angeles, for respondent Underwriters at Lloyds, London.

WILSON, Justice.

This is an action for declaratory relief in which plaintiff seeks a judicial interpretation of its rights under three policies of products liability insurance, one of which was issued by defendant Hartford Accident and Indemnity Company and two by Underwriters at Lloyd's, London.

Plaintiff and cross-complainant The Troy Company are appealing from the judgment determining the liabilities of defendant insurance companies under their respective policies.

There are but two questions for determination: (1) Are defendant insurance companies liable under their policies for damage occurring after the policies had been cancelled but resulting from the use of plaintiff's product which had been sold during the periods of the respective policies; (2) as to cross-complainant The Troy Company, did defendant Underwriters effectively cancel its policies?

Prior to engaging in the manufacture of antifreeze compound known as Protexem, plaintiff procured a $10,000 policy of insurance from Hartford protecting it against any claims which might arise from the use of that product, effective October 10, 1947, to October 10, 1948, and a $40,000 excess policy from Underwriters effective October 23, 1947, to October 23, 1948.

Plaintiff commenced the manufacture of its antifreeze product and sold all of it to The Troy Company which disposed of it through distributors and wholesalers and by means of its own salesmen throughout various states. The first sale to Troy was made on October 17, 1947, and the last on December 2. 1947.

Because plaintiff and Troy had used Hartford's name in advertising the antifreeze product Hartford cancelled its policy effective November 13, 1947. That policy was then replaced by a $10,000 primary policy issued by Underwriters effective November 10, 1947, to November 10, 1948. After numerous claims for damages had been reported to the local representative of Underwriters it cancelled both of its policies as to plaintiff effective December 8, 1947.

The premium charged by both insurance companies for products liability coverage was based upon the dollar volume of sales of antifreeze made by plaintiff during the periods the companies admitted their policies were in effect.

It is the contention of plaintiff that defendant Hartford is liable for all damages suffered through the use of antifreeze manufactured and sold, and upon the selling of which it collected a premium, so long as the damage occurred between October 10, 1947, and October 10, 1948, but not to exceed $10,000; that Underwriters is liable on its primary policy up to its limit of $10,000 for all damages suffered through the use of any antifreeze manufactured and sold by plaintiff after November 10, 1947, regardless of when the damage occurs; that as between the two primary insurance carriers the limit of liability of Hartford's policy should be exhausted before Underwriters shall become liable on its primary policy and that after the liability under the two primary policies is exhausted Underwriters should be liable on its excess policy, to the limit of that policy, for all damages resulting from the use of the antifreeze sold during the term of that policy without regard to when the damage occurs; that the date when the damage occurs in any accident rests upon its own peculiar facts.

In addition to advancing the same contentions as does plaintiff, cross-complainant Troy, which is named as an assured in each of the policies, maintains that insofar as it is concerned Underwriters failed to cancel its policies.

Defendants Hartford and Underwriters admit liability under their respective policies for accidents which occurred during the effective period of each policy but assert they are not liable for accidents occurring after the dates of their respective cancellations.

The Hartford Policy

The pertinent portions of the Hartford policy are as follows:

"Insuring Agreements

"I. * * *

"Coverage D—Property Damage Liability—Except Automobile

"To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, * * * for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident * * *.

"IV. Policy Period * * *

"This policy applies only to accidents which occur during the policy period * * *.

"Conditions

"3. Definitions. * * *

"(c) Products Hazard. The term 'products hazard' shall mean

"(1) the handling or use of, the existence of any condition in or a warranty of goods or products manufactured, sold, handled or distributed by the named insured, * * * if the accident occurs after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured * * *.

"17. Cancellation. * * * This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date of cancelation stated in the notice shall become the end of the policy period * * *.

"Declarations * * *

"Item 2. Policy Period: From October 10th, 1947 to October 10th, 1948 * * *."

[1, 2] It is a primary rule of interpretation that since an insurance policy is generally drawn by the insurer, any uncertainties or ambiguities in its terms are to be construed most liberally in favor of the insured. Blackburn v. Home Life Ins. Co., 19 Cal.2d 226, 229, 120 P.2d 31; Culley v. New York Life Ins. Co., 27 Cal.2d 187, 194, 163 P.2d 698. In the absence of an ambiguity a contract of insurance, like any other contract, must be interpreted according to the object and intention of the parties as expressed in the policy, in the light of the circumstances surrounding its execution. Blackburn v. Home Life Ins. Co., supra; Jew Fun Him v. Occidental Life Ins. Co., 88 Cal.App.2d 246, 249, 198 P.2d 711; Burr v. Western States Life Ins. Co., 211 Cal. 568, 576, 296 P. 273.

It is obvious that what plaintiff sought in obtaining insurance was protection against damage resulting from the use of its product after it was on the market. Such contingency is plainly covered under "Condition (c)" and "Coverage D." The period of the policy is declared to be from October 10, 1947, to October 10, 1948, but there is also a provision equally clear in the policy that it may be cancelled by the insurer upon five days' notice to the insured and that the effective date of the cancellation shall become the end of the policy period. Under paragraph "IV," recovery is specifically limited to accidents occurring "during the policy period."

[3–5] The cancellation clause does not render the policy ambiguous nor is it in conflict with the other provisions. Each clause of the contract must be considered with reference to every other clause upon which it has any bearing and all the provisions are to be construed together for the purpose of ascertaining the intent of the parties. Burr v. Western States Life Ins. Co., 211 Cal. 568, 575, 296 P. 273. When so considered, the only reasonable interpretation which can be given to the terms of the policy is that it was the intention of the parties that the policy was to be in effect from October 10, 1947, to October 10, 1948, unless it were sooner cancelled, in which event the end of the policy period would be the date of cancellation. Since recovery is limited to accidents occurring "during the policy period" the insurance company cannot be held liable for accidents occurring after the end of that period or November 13, 1947, the date of the cancellation. To construe it otherwise would give effect only to the clause declaring the policy period and would ignore the provisions of cancellation clause. Since the language of the policy is clear and unambiguous its plain and unequivocal terms cannot be disregarded to make a new contract for the parties. Brickell v. Atlas Assurance Co. Ltd., 10 Cal.App. 17, 28, 101 P. 16; Finkbohner v. Glens Falls Ins. Co., 6 Cal.App. 379, 381–382, 92 P. 318.

Plaintiff admits that notice of cancellation was properly given. It also concedes that Hartford is not liable for accidents occurring after October 10, 1948. It asserts, however, that because Hartford collected premiums based upon sales made between October 10, 1947, and November 13, 1947, to allow the company to cancel the policy as of the latter date and to disclaim liability for accidents occurring thereafter is tantamount to a fraud on the insured which has paid for protection it has not received. This contention is without merit. Had Hartford not cancelled and had the policy remained in effect for the full one-year period, the insurance company would have collected premiums based upon sales made during the entire year. At the end of that time had plaintiff failed to obtain a new policy or had Hartford refused to renew its policy, admittedly plaintiff would have no claim for accidents occurring after the expiration date from the use of its product sold during the policy period. Plaintiff is not in any worse position because the policy was cancelled and premiums were collected only for sales made during the period the policy was in effect. Plaintiff had five days in which to secure protection and, indeed, it immediately obtained another policy from Underwriters which was in effect three days before the cancellation by Hartford became effective.

The Underwriters' Policies

The liability of Underwriters under its excess policy is contained in a rider, reading in part as follows:

"To indemnify the Assured for any and all sums which the Assured shall by law become liable to pay, and shall pay or by final judgment be adjudged to pay * * * to any person or persons as damages for damage to property * * * by reason of operations more fully described in Policy No. LCX 5974 issued to the Assured by the Hartford Accident and Indemnity Company, hereinafter called the Primary Insurer.

"1. It is expressly agreed that as regards damage to property, the Underwriters hereon shall be liable only for the excess of loss over the aggregate liability of the primary Company of $10,000.00 ultimate net loss in respect of all accidents or occurrences during the policy period and then only up to Forty Thousand Dollars ($40,000.00) aggregate liability in all accidents or occurrences. It is understood and agreed that the Underwriters liability shall not exceed One Thousand Dollars ($1,000.00) in any one claim or occurrence and not more than Forty Thousand Dollars ($40,000.00) aggregate liability in the period of this Certificate.

"It is understood, however, that there is no limit to the number of accidents for which claims may be made hereunder, provided such accidents occur during the currency of this Certificate * * *.

"5. It is understood and agreed that this Certificate is subject to the same warranties, terms and conditions * * * as are contained in or as may be added to said policy of the Primary Insurer * * *.

"7. This Certificate shall be cancelled * * * by or on behalf of the Underwriters by giving five day's [sic] notice of such cancellation."

Underwriters' liability under its primary policy which was issued as a substitute for the Hartford policy, is expressed in a rider which reads:

> "Products Property Damage
>
> "To pay on behalf of the Assured all sums for which the Assured may become obligated by reason of the Liability imposed upon the Assured by law for damages or destruction of property caused by or due to any merchandise or product described in this policy occurring within the United States or Canada, arising out of the existence, possession, consumption or use of any product manufactured, sold, handled, delivered or distributed by the Assured during the term of this policy or prior thereto, whether sold for consideration or distributed gratis and while these products are away from the Assured's premises and are out of the care or custody of the Assured or his employees.
>
> "Limits Endorsement
>
> "It is further agreed that the Underwriters liability under this endorsement shall be limited to the sum of One Thousand and No/100 Dollars ($1,000.00) for damage to or destruction of property of any person or persons arising out of one accident and subject to said limit per accident the Underwriters liability is limited to Ten Thousand and No/100 Dollars ($10,000.00) for all accidents occurring during the period of this policy * * *."

The policy also contains a cancellation clause reading as follows:

> "This Certificate shall be cancelled at any time at the written request of the Assured or by or on behalf of the Underwriters by giving five days' notice of such cancellation; if cancelled by or on behalf of the Underwriters notice of cancellation mailed to the address of the Assured stated in this Certificate shall be sufficient notice. * * *"

Plaintiff contends that since Underwriters insured against liability "arising out of the existence, possession, consumption or use of any product manufactured, sold, handled, delivered or distributed by the assured during the term of this policy or prior thereto," the time when the damage occurs does not affect the coverage so long as the product was sold and out of the possession of the assured during the stated term of the policy or prior thereto. By this reasoning plaintiff has obviously disregarded the language contained in the "Limits Endorsement" of the primary policy to the effect that the insurer's liability shall be limited to $10,000 for *"all accidents occurring during the period of this policy"* and the provisions of the cancellation clause.

Underwriters' excess policy also contains a cancellation clause and specifically provides that there is no limit to the number of accidents for which claims may be made *"provided such accidents occur during the currency of this Certificate"* and that Underwriters shall be liable only for the excess of loss over the aggregate liability of the primary company *"in respect of all accidents or occurrences during the policy period"* and not more than $40,000 aggregate liability *"in the period of this certificate."*

Considering all the clauses together the only construction which can be given to the policy is that the insurance company is liable for damages arising out of the use of plaintiff's product manufactured, sold, handled, delivered or distributed either during or prior to the term of the policy provided the accident occurs during the policy period. Underwriters having effectively cancelled its policies on December 8, 1947, cannot be held liable to plaintiff for accidents occurring subsequent to that date.

Plaintiff cites the case of Kelley v. Indemnity Ins. Co., 252 App.Div. 58, 297 N.Y.S. 228, 230, affirmed without opinion, 276 N.Y. 606, 12 N.E.2d 599, as determinative of the issues on this appeal. The facts of that case are almost identical with those in the instant action. The insurance company issued a products liability policy effective for one year. While the policy was in force the insured shipped a consignment of one of its manufactured products. Subsequently the policy was cancelled for nonpayment of premium and less than a week later while the shipment was being unpacked one of the bottles exploded causing personal injuries. The distinction between the Kelley case and the one under consideration is in the language contained in the two policies. In the cited case the insuring clause indemnified against bodily injuries accidentally suffered during the term of the policy by any person not employed by the assured. Attached to the policy, however, was a rider stipulating that the insuring clause was eliminated and in lieu thereof the assured agreed to pay any loss incurred on merchandise "manufactured, handled or distributed by the assured which has actually been sold to a purchaser * * * during the term of this endorsement, * * *." The policy also contained another endorsement providing that in consideration of a flat charge of $10.00 the policy was extended to cover liability of the assured in respect of products sold prior to the inception date of the policy for "accidents occurring during the policy". The court held that the printed provisions of the insuring portion of the policy having been eliminated the language contained in the rider was controlling; that the insurer was liable under its policy for injuries occurring at any time from products sold after the effective date of the policy but with respect to products sold prior to the effective date of the policy the insurer's liability extended only to accidents occurring during the policy period.

Troy Company Cancellation

[6] Written notice of cancellation of each of Underwriters' policies was sent to plaintiff by the insurance company but no notice of cancellation was given by that company to Troy. It is admitted that Troy had knowledge of such cancellation through the plaintiff and it was upon such actual notice that the trial court found that the policies were effectively cancelled.

In a rider attached to Underwriters' excess policy under "Remarks" it is provided: "It is hereby understood and agreed, anything in the policy to the contrary notwithstanding, that the policy may not be cancelled by the Company or reduced in coverage by the Company until five (5) days' [sic] after notice of cancellation or reduction in coverage has been given, in accordance with the conditions of the policy to The Troy Co., 520 West 22nd Street, Los Angeles, California."

In the cancellation clause of the primary policy it is provided that "if cancelled by or on behalf of the Underwriters notice of cancellation mailed to the address of the Assured stated in this Certificate shall be sufficient notice."

Since notice was not given by Underwriters to Troy, either written or otherwise, the insurance company has not complied with the provisions of its policies and cancellation was not effective as to The Troy Company. Neither notice to plaintiff nor the fact that Troy learned of the cancellation relieves the insurance company from the necessity of giving notice in accordance with the terms of its policies.

The judgment insofar as it is (1) in favor of Hartford Accident and Indemnity Company and Underwriters at Lloyd's, London and against plaintiff, (2) in favor of Hartford Accident and Indemnity Company and against The Troy Company is affirmed, and insofar as it is in favor of Underwriters at Lloyd's, London and against The Troy Company it is reversed with directions to enter judgment in favor of The Troy Company.

MOORE, P. J., and McCOMB, J., concur.

102 Cal.App.2d 298

WARREN v. NAIR et al.

Civ. 18076.

District Court of Appeal, Second District, Division 2, California.

Feb. 15, 1951.

Action by Edwina Warren against Hannah Nair, individually and as executrix of the estate of Thomas L. Nair, also known as Tom Nair, deceased, to compel construction of a penthouse and additional parking area on leased premises. The Superior Court, Los Angeles County, Philbrick McCoy, J., rendered judgment for the defendant and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained finding that lessee never entered into agreement to construct penthouse or additional parking area.

Judgment affirmed.

1. Witnesses ⚷159(2)

In action by lessor against deceased lessee's executrix on alleged agreement for construction of penthouse and additional parking area on leased premises, exclusion of lessor's testimony concerning sketches of proposed alterations and conversations with decedent lessee was proper. Code Civ.Proc. § 1880, subd. 3.

2. Witnesses ⚷159(2), 165

A claimant against an estate cannot testify at all as to any matter or fact occurring before the death of such deceased person, whether incidental, preliminary or otherwise, except by statutory rule which permits the identification of books kept by the deceased during his lifetime. Code Civ. Proc. § 1880, subd. 3.

3. Appeal and error ⚷1056(1)

In action by lessor against deceased lessee's executrix on alleged agreement for construction of penthouse and additional parking area on leased premises, exclusion of lessor's testimony concerning sketches of proposed alteration and conversation with decedent lessee even if lessor was competent to testify, was not prejudicial where disinterested witnesses could have supplied the same information. Code Civ. Proc. § 1880, subd. 3.

4. Witnesses ⚷178(3)

Cross-examination on matters occurring prior to decedent's death, by one who seeks the benefits of the "dead man's statute" may operate as a waiver of benefits of statute. Code Civ.Proc. § 1880, subd. 3.

5. Witnesses ⚷178(3)

In an action by lessor against deceased lessee's executrix on alleged agreement for construction of penthouse and additional parking area on leased premises, interrogation by executrix's attorney on cross-examination wherein he avoided inquiring of witness on any matter occurring prior to lessee's death, did not waive benefit of "dead man's statute." Code Civ.Proc. § 1880, subd. 3.

6. Evidence ⚷594

In action by lessor against deceased lessee's executrix on alleged agreement for construction of penthouse and additional parking area on leased premises, uncontroverted and unimpeached testimony of lessor's witnesses, who had claims rejected against estate of deceased lessee, was possibly biased and it was not mandatory for court to accept their testimony.

7. Landlord and tenant ⚷159(1)

In action by lessor against lessee's executrix on alleged agreement for construction of penthouse and additional parking area on leased premises, evidence sustained finding that the lessee had never entered the alleged agreement.

8. Appeal and error ⚷1010(1)

Where the record is supported by substantial proof, the appellate court is powerless to substitute another evaluation of the evidence for that of the trial court.

◆

A. W. Brunton, Los Angeles, for appellant.

Abe Richman, Los Angeles, for defendants and respondents.

MOORE, Presiding Justice.

This appeal is from a judgment adverse to plaintiff declaring that defendant Hannah Nair is under no duty to construct a room, herein called the "penthouse," on the roof of certain property leased by defendant's testator from appellant, or to complete the construction of an additional parking area at the rear of such property.

Under date of July 23, 1948, appellant and defendant's husband, now deceased, executed a lease whereby decedent agreed as part of the consideration for the lease to make certain alterations designed to complete the conversion of the property into a business structure with a parking lot at the rear. Appellant was to furnish $8000 for such renovation and the lessee was to repay this sum in monthly installments of $100 each. Lessee was also to pay the total rental for a 20-year-term in monthly installments of $400 for the first ten years and $450 for the second ten years. Respondent executed a written guaranty as to the obligations assumed by the lessee. Prior to the execution of the agreement, plans for the alterations had been prepared and, although reference was made to them in the lease, they were not attached to or incorporated therein. Mr. Nair (lessee) commenced the contemplated alterations and same were in progress at the date of his death, October 18, 1948. Mrs. Nair, having thereafter qualified as his executrix, completed the construction with the exception of the matters in dispute herein.

Reversal of the judgment is demanded on two grounds: namely, (1) the court's rejection of appellant's offer to testify relative to certain matters; (2) the evidence does not support the findings.

[1] It was not error to strike from the record the testimony of appellant concerning sketches of the proposed alterations or her testimony describing the penthouse and the condition of the parking area as they appeared at the time of the trial. Such sketches and the testimony of conversations with decedent were stricken pursuant to respondent's objection that it was improper under the "dead man's statute," Code of Civil Procedure, section 1880, subd. 3, which provides that a party to a proceeding upon a claim against the estate of a deceased person is barred from testifying "as to any matter or fact occurring before the death of such deceased person."

[2] The ruling was correct insofar as it was directed to the bulk of appellant's testimony. A claimant against an estate "cannot testify at all 'as to any matter or fact occurring before the death of such deceased person,' whether incidental, preliminary, or otherwise." Deacon v. Bryans, 88 Cal.App. 322, 329, 263 P. 371, 374. The only exception made to the statutory rule has been to permit a plaintiff to identify books kept by the deceased during the latter's lifetime. See Stuart v. Lord, 138 Cal. 672, 677–678, 72 P. 142. It cannot be denied that the testimony in regard to the sketches sought to do more than to identify them. By the excluded inquiries the witness was questioned in regard to certain statements that appeared on the sketches as to discussions of the alterations with the decedent and as to whether these statements were on the face of the drawings at the time of the discussions. Certainly, the aim of such testimony was to establish the claim sued upon. It was for the purpose of preventing frauds upon the heirs of a decedent that the "dead man's statute" was enacted. Knight v. Russ, 77 Cal. 410, 413, 19 P. 698. Also, the testimony concerning the penthouse and parking lot appears to be more than a report of the condition of the property as it existed at the date of the lease. There is no showing in the record that the construction referred to did not take place during the decedent's lifetime.

[3] Assuming that appellant was competent to testify concerning these matters it is not shown that she has been prejudiced by its exclusion since available disinterested witnesses apparently could have supplied the same information.

[4, 5] Appellant contends that respondent by cross-examining her on matters occurring before Mr. Nair's death waived any benefits under the provisions of the statute. While a waiver may result from such method of cross-examination, Stankey v. Palmer, 6 Cal.App.2d 215, 216, 44 P.2d 382; Davis v. Mitchell, 108 Cal.App. 43, 46, 290 P. 887; Deacon v. Bryans, supra,

88 Cal.App. at page 329, 263 P. at page 371, yet in the case at bar it does not appear that respondent carried her interrogations to such extent as to "open the door" to an unrestricted cross-examination. A review of the record discloses that respondent's attorney was painstakingly careful to avoid inquiring of the witness on any matter occurring prior to Mr. Nair's death, as indicated by the prefatory phrases preceding his questions such as "after Mr. Nair's death" or "from October 18, 1948."

[6] Reversal is demanded also upon the grounds (1) that the evidence fails to support the judgment as entered; (2) that the evidence compels a finding that she was entitled to have the construction completed as agreed. Appellant rested her expectations upon the testimony of one Lloyd Hampton who was employed by Mr. Nair to make the alterations and of one Diane Hampton who drew the plans introduced in evidence by appellant. It is urged that this testimony has not been controverted, is not inherently improbable, has not been impeached and therefore must be accepted by the court as true. Dobson v. Dobson, 86 Cal.App.2d 13, 14, 193 P.2d 794. However, it was developed from these witnesses that both had filed claims against the decedent's estate and that both had been rejected. Thus in view of this evidence of possible bias on their part it was not mandatory for the court to accept their testimony.

[7, 8] The evidence was also substantial that Mr. Nair had never had possession of the plans introduced. A building inspector of the city of Los Angeles testified that no plans were filed in connection with the procuring of a permit to make the alterations agreed upon although ordinances required the filing of such plans with the building department where second story construction is involved. He also testified that no penthouse was contemplated for the roof to his knowledge and he had personally inspected the alteration work on the premises. Furthermore, both the contractor who completed the alterations and Mrs. Nair testified that no such plans had ever been seen before they appeared in court. Also Mr. Freed who assisted the respondent in effecting the alterations testified that he had never before seen such plans. The testimony of these witnesses alone is ample to support the findings. It follows that in view of this substantial proof, the appellate court is powerless to substitute another evaluation of the evidence for that of the trial court. Crawford v. Southern Pacific Company, 3 Cal. 2d 427, 429, 45 P.2d 183.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

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102 Cal.App.2d 435

WALSH et al. v. MACAIRE et al.

Civ. 17721.

District Court of Appeal, Second District,
Division 3, California.
Feb. 20, 1951.

Action by Harry J. Walsh, and another, against Scott D. Macaire, and another, for specific performance of an agreement to purchase a parcel of land. The Superior Court, Los Angeles County, W. Turney Fox, J., rendered judgment decreeing specific performance and plaintiffs appealed because of inadequate relief. The District Court of Appeal, Shinn, P. J., held that vendee should not have been left to action at law for breach of contract, but if specific performance to right of way could not have been granted, vendee was entitled to damages as a matter of right.

Judgment reversed with directions.

1. Specific performance 🔑121(9)

In action by vendee for specific performance of agreement in form of escrow instructions to purchase land, where agreement contained provision that vendor and vendee agreed to furnish metes and bounds description of road to be used by vendee for egress and ingress, and evidence clearly showed right of way agreement was an inseparable part of vendee's purchase agreement evidence was sufficient to require finding as to alleged agreement.

2. Equity ⚷39(1)

Where a court has taken jurisdiction of an equitable action, the court may determine all legal as well as equitable issues in order to make complete disposition of the matters in controversy.

3. Specific performance ⚷128(2)

Where evidence clearly showed that right of way agreement was an inseparable part of vendee's purchase agreement, vendee should not have been left to action at law for breach of contract, but if specific performance right of way agreement was not possible, vendee was entitled to damages as a matter of right.

4. Specific performance ⚷123

In action by vendee for specific performance of agreement in form of escrow instructions to purchase land, where agreement contained provision that vendor and vendee agreed to furnish metes and bounds description of road to be used by vendee for egress and ingress, and pleadings raised issue as to whether the land abutted on a public road, the court should have determined question before it could be known whether vendee could reach public road, and also what damages vendee suffered through inability to procure a right of way if vendee proved alleged agreement.

5. Specific performance ⚷121(9)

In action by vendee for specific performance of agreement in form of escrow instructions to purchase land, where agreement contained provision that vendor was to supply vendee with adequate supply of water from vendor's property until water was available from public utility, and agreement rested largely in parol, and substantial part performance had been taken by the parties, evidence sustained finding that vendee's water right was nonexclusive.

6. Specific performance ⚷128(4)

Vendee's original complaint, which stated a good cause of action for equitable relief, and prayed for specific performance and for general relief, was sufficient to enable the court to award complete relief including damages if performance was due but could not be decreed with respect to right of way.

7. Specific performance ⚷116½

In action by vendee for specific performance of agreement in form of escrow instructions to purchase land, where vendee claimed that property description in agreement was different from boundaries shown to vendee by vendor, vendee should have been permitted to amend complaint to present such matter, if vendee so desired.

Harry J. Walsh, Los Angeles, in pro. per. and for appellant, Mary M. Walsh.

Martin & Bowker, Tujunga, for respondents.

SHINN, Presiding Justice.

Plaintiffs brought this action for specific performanace of an agreement to purchase from defendants a parcel of land 400 feet by 525 feet in the City of Los Angeles in a community known as Tujunga. Although plaintiffs have spent $12,800 building a house and otherwise improving the property to which they have no title, and are in much need of performance by defendants, they have appealed from a judgment in their favor decreeing specific performance, contending that they were granted inadequate relief. Most of their contentions are untenable. The serious question is whether the court failed to make findings on all material issues and should have considered and determined the question of plaintiffs' damage with respect to a certain feature of the agreement as to which specific performance could not be decreed.

The land in question is on a brush-covered hog back bordering on Haines Canyon and is not served by any public utility. There is what is known as a fire road extending from a public road in Haines Canyon to and beyond the property in question. From Haines Canyon Avenue the road leads across some privately owned land, government land in the Angeles National Forest and other land of the defendants. It is used by federal, state and county agencies in fire prevention and other protective work. So far as shown the right of these agencies to use the road is no more than a reserved easement.

The agreement was in the form of escrow instructions executed by the parties. They contained the following: "Buyer and seller agree to furnish the metes and bounds description of the road which is to be used as a means of agress [sic] and ingress for the Buyer, and you are to draw at the close of your escrow a separate agreement using this description which is to be signed by both buyer and seller, and remain in effect as long as buyers, their heirs or assigns, shall use above described property.

"You are further instructed and authorized, without any liability or responsibility on your part whatsoever, to draw, at the close of your escrow, an agreement as between the buyer and seller as to the use of and right in an adequate supply of water which is to be furnished by seller from sellers property, until water is available from public utilities."

There was no other executed written agreement covering these matters. The pleadings raised the following issues: (1) Whether defendants agreed to provide as a part of the transaction, an irrevocable right of ingress and egress for plaintiffs over the fire road; (2) whether the land being purchased bordered on a public road; plaintiffs alleged it did not; defendants alleged that it did; (3) what was agreed as to plaintiffs' right to be furnished with water from a spring on other land of the defendants; (4) what were the terms of payment for the land.

The findings, as far as they went, were in favor of plaintiffs. They have paid some $1,800 on their contract. The decree orders them to give their promissory note for the balance, $2,351.26, including interest, payable $50.00 or more per month at 6 per cent and a trust deed on the real property securing the same. It orders defendants to convey title and furnish a policy of title insurance showing title in plaintiffs subject only to taxes, conditions, restrictions, reservations, rights and rights of way of record and said trust deed; also to grant an easement for a pipe line and maintaining a pump and motor at the spring on defendants' land, and an easement for the purpose of conducting and maintaining a power line over defendants' land, the location of the easements being described in the decree. There was a finding that plaintiffs should have a non-exclusive right to use a maximum of 1200 gallons of water per day from defendants' spring until such time as water may be available from a public utility, but the decree is silent as to plaintiffs' right to use water from the spring.

The court specifically declined to make a finding with respect to the alleged agreement of defendants to provide plaintiffs with a right of way for ingress and egress. The decree is silent as to that matter also.

[1] Finding No. 11 reads as follows: "No finding is made herein as to what, if any, permanent right of way was promised by the Defendants, Scott D. Macaire and Ada R. Macaire over that certain road in Haines Canyon, referred to in the testimony as the 'Fire Road'. The purpose of this finding being that since the plaintiffs, Harry J. Walsh and Mary M. Walsh would not be entitled to specific performance of such an agreement, of [sic] any was made, the parties hereto should be left to their rights and remedies at law and the denial of the Plaintiffs' motion to amend their complaint shall be without prejudice to either party in this action." The evidence was such as to require a finding as to the alleged agreement. On February 4, 1947, Mr. Walsh wrote Macaire saying, in part: "I would want a right of way to and over the fire road to Haines Canyon." On February 10, 1947, Macaire replied to Walsh: "You should have 400 feet that would give you property down to Haines Canyon Road and take in that flat on the west side of the Hog's Back." Enclosed with this letter was a small map showing the location of the property and that it abuts upon a road other than the fire road. Mr. Walsh testified that defendants promised to provide a right of way. There was undisputed evidence that defendants tendered to plaintiffs only a Forest Ranger's revocable permit for plaintiffs to use the road.

[2] Having taken jurisdiction of an equitable action the court may determine all legal as well as equitable issues in order to make a complete disposition of the matters in controversy (see cases collected 10 Cal. Jur., Equity, sec. 42, p. 499; 23 Cal. Jur., Specific Performance, sec. 67, p. 511, and 10 year supp.).

[3] Plaintiffs should not have been left to an action at law for breach of defendants' alleged contract to provide an outlet from the property to a public road. Whatever the agreement may have been it was clearly shown by the evidence that the right of way agreement was an inseparable part of plaintiffs' agreement to purchase the property. If plaintiffs could not have specific performance of that part of the agreement they were entitled to damages as a matter of right. Evidence was introduced by the parties on this issue and presumably it was all the evidence they had to offer. The issue should have been decided.

[4] Although the pleadings raised the issue as to whether the land abutted on a public road, the court made no finding upon that issue. After reading the testimony concerning this matter we are not sure that the parties themselves knew where the corners were located on the ground with relation to the Haines Canyon Road. Defendants evidently believed when they agreed to sell the land that it did extend to the road. The court should have had the benefit of the evidence of a competent surveyor on that issue. The question was one that had to be determined before it could be known how plaintiffs could reach a public road, and also what damages they suffered through their inabiltiy to procure a right of way over the fire road if they were able to prove the agreement as alleged.

[5] Plaintiffs contend that they had no valid agreement to be furnished with water and that the court erroneously decreed that they have a water right. If the agreement, which rested largely in parol, was defined by the court so as to give plaintiffs a substantial water right they should not be the ones to complain. It is sufficient to say that in view of the fact that the agreement rested largely in parol and there had been substantial part performance by the parties, the court properly defined the agreement in accordance with the oral promises of defendants. It is fortunate that plaintiffs prevailed upon that issue as otherwise they would have no water supply. The finding that the water right of plaintiffs was non-exclusive was in accord with the evidence that others had been given a right to use water from the spring.

The findings with relation to the terms of the sale and the giving of a note and trust deed were in accordance with the escrow instructions of June 7, 1947 and December 24, 1947.

The provision of the decree that defendants' deed should be subject to conditions, etc. *now* of record should be amended to relate to the date of the original escrow instructions. It was not error to add interest in computing the balance unpaid.

[6, 7] The court withheld decision of the case from December, 1948, until August, 1949, in order to allow the parties time to work out their differences. In June plaintiffs made a motion to reopen the case and to amend their complaint to pray for damages. Their motions were denied. Plaintiffs stated a good cause of action for equitable relief and prayed for specific performance and for general relief. Amendment of the complaint was not necessary to enable the court to award complete relief with respect to the right of way issue. Union Oil Co. v. Reconstruction Oil Co., 20 Cal.App.2d 170, 66 P.2d 1215. The right to damages where performance was due but could not be decreed fully was within the issues to be tried.

When the parties were before the court in June defendants' counsel stated that title of defendants was clouded by a "wild" deed to one Pauline Thompson who had executed and delivered a quitclaim deed to defendants' former attorney for a consideration of $10.00 but that the deed had not been recorded; they would get another deed if they could find Pauline Thompson. No title report had been made until May, 1949. The description in the Thompson deed was vague and might or might not have been intended to relate to defendants' land. Another matter which was brought to the attention of the court was the claim of plaintiffs that the description of the property in the agreement differed from the boundaries shown to them by defendants. If plaintiffs so desire they should be permitted to amend their complaint. Other contentions of plaintiffs do not merit discussion.

The judgment is reversed for the trial of those issues only which remain undetermined, and for such other proceedings as may be necessary for a complete determination of the matters in controversy.

WOOD and VALLÉE, JJ., concur.

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102 Cal.App.2d 308

PEOPLE v. MONSON.

Cr. 4547.

District Court of Appeal, Second District,
Division 2, California.
Feb. 15, 1951.

Francisco Monson was convicted in the Superior Court, Los Angeles County, David Coleman, J., of arson and defendant appealed. The District Court of Appeal, Moore, P. J., held that the trial court did not err in sustaining objections to questions asked for the purpose of showing bias, prejudice and interest of the prosecution's only direct witness.

Affirmed.

1. Criminal law 🔑1134(6)

The conduct of a criminal trial is to be viewed in the light of what actually occurred in trial court, not by what may subsequently be printed in a brief.

2. Criminal law 🔑1030(1)

Alleged errors in a criminal prosecution must have been declared at the trial in order to constitute them grounds for reversal after trial court's refusal to make a favorable ruling.

3. Criminal law 🔑1036(2)

In arson prosecution, where defendant offered certain evidence concerning ownership of destroyed premises, and upon objections to questions, failed to make any offer of proof as to the relevancy of the questions, or what he intended to bring out by them, defendant could not upon appeal assert basis for the questions and reasons why they should have been admitted. Pen. Code, § 447a.

4. Criminal law 🔑330

When an accused person is not guilty of the crime for which he is on trial, it is incumbent upon him to offer proof by his cross-examination of such facts as he has impliedly asserted to exist or of such facts as are available that will impeach his accuser.

5. Criminal law 🔑1170(1)

In arson prosecution, where defendant on cross-examination of his accuser, brought out fact that accuser did not have a certain trunk of third party in the destroyed building, defendant was not prejudiced by the exclusion of evidence that the witness did have the trunk in question, for even if so, it would not have tended to impeach the witness.

6. Criminal law 🔑1170½(1)

In arson prosecution, no prejudicial error was shown to have been committed by the trial court in guiding the examination of the prosecution's only direct witness.

7. Criminal law 🔑1043(1, 3)

In seeking a reversal of a judgment for exclusion of evidence, an appeal is fruitless where appellant did not fully state purpose of his offer and facts sufficient to demonstrate its materiality unless question shows on its face that it was material to issue, and appellant cannot succeed where on appeal he states a purpose different from that given at the time of his offer.

8. Criminal law 🔑1170(1)

In order to predicate error on sustaining objections to a question, it must appear to be relevant and material and its materiality must be so patent that injury will be presumed from adverse ruling.

9. Witnesses ⚡267

The extent to which cross-examination may be carried rests largely in discretion of trial court.

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Zeman and Hertzberg and Harrison W. Hertzberg, all of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

From a judgment convicting him of arson defendant demands a reversal on the ground that the trial court sustained objections to questions asked for the purpose of showing "bias, prejudice and interest of the prosecution's only direct witness."

Appellant and his wife had been separated for about two months. She and her children resided in a house on a Los Angeles boulevard while her father lived in the apartment over the garage in the rear. On a February evening appellant called to see his wife. Finding her absent he sat in an automobile parked at the front to await her return. When she arrived with her five children about 10 p. m. he asked her to go home with him. When she refused he said that if she and the children did not he would burn down the house and everything in it. As they entered the home, he remained in the yard.

Mr. Sanchez, appellant's father-in-law, had retired about nine p. m. in the apartment above the garage and lay reading at 11:20 when he was disturbed by a noise outside. That was followed by the sound of someone's opening doors. As he peered through the window a fire started below him and appellant stood at the left of the garage door bending over with his face inside and his right hand extended toward the burning. As Sanchez descended to the ground appellant ran through the garden in the rear. The structure having been destroyed two firemen from the city's arson bureau inspected the remains and at the trial testified that the fire originated just inside and to the left of the door in an area where a highly volatile fluid had been ignited. They established that there had been nothing there susceptible of spontaneous ignition or that might have caused the fire by accident. Appellant denied the accusation and all incriminatory acts charged against him but he was unable to overcome the testimony (1) of his son who had heard the threat, (2) of Sanchez who saw him at the scene and (3) of the firemen whose opinions excluded every reasonable theory of the fire's origin save that of the instrumentality of appellant.

The rulings of the court which are assigned as error were made to several questions propounded to Mr. Sanchez on cross-examination which will be discussed in the order presented. All objections were on the general ground of immateriality and irrelevancy.

A.

1. Did not this property formerly belong to Mr. Monson?

2. Was not the contract of purchase turned over to you by Mr. Monson?

3. Did not the owner of the place tell you that he desired to move into that garage within a few days?

Objections having been sustained to each question, appellant's counsel in setting forth the purpose of the questions stated that the place was being purchased on contract; there was litigation between Sanchez and the owner who just a few days before the fire had demanded the right to move into the garage. It was vital to the proposition that if they could get possession the garage had no value except as a storage place.

Whether appellant owned the house or Sanchez had litigated with the owner or the latter had demanded possession were immaterial to the issue of whether he set fire to it. People v. George, 42 Cal.App.2d 568, 570–73, 109 P.2d 404; Penal Code, sec. 447a. Nothing in the questions or in counsel's statement of his purpose indicates testimony that would impeach Sanchez or show a motive for giving false testimony.

On appeal appellant declares that by such questions he was attempting to establish a change in ownership and possession of the garage that was to occur in a few days after the date of the fire; that since the property was being sold under contract Sanchez had to vacate in the near future; that Sanchez while occupying the garage had carried fire insurance thereon under the misapprehension that as soon as he should leave it his insurance would be no longer payable to himself but to the new occupant even though Sanchez should retain title as security for the unpaid balance of the purchase price; that Sanchez had told people he would lose everything if the place should burn while he was not living there. Appellant now argues that because Sanchez suffered such misapprehension, he would be the person to gain from the building's destruction by fire; that since Sanchez knew he would be the only one to profit from a fire and that others would think so, his motive for testifying for the prosecution would be for the purpose of avoiding suspicion of himself as the incendiarist; that if such facts were shown "the prejudice behind Sanchez' testimony could have been considered."

[1–4] No such argument having been made in support of his offer of the proof indicated by the three questions, appellant is in no position to rely upon thoughts that either struggled for expression at the trial and failed to be articulated or that were conceived at some later time. The conduct of the trial court is to be viewed in the light of what actually occurred in its presence, not by what may subsequently be printed in a brief. Its alleged errors must have been declared at the trial in order to constitute them grounds for reversal after the court's refusal to make a favorable ruling. Since the purpose of the questions as now claimed by appellant did not appear from them, it was obligatory upon appellant to disclose such purpose in response to the objections. But, if he had proof of his own former ownership of the garage or of his transfer thereof to Sanchez or of the new owner's intention to occupy the structure within a few days or of Sanchez' declaration that he would lose all in the event of fire before the balance of the sale price should be paid, he should have offered it. When an accused person is not guilty of the crime for which he is on trial it is incumbent upon him to offer proof by his cross-examination of such facts as he has impliedly asserted to exist or of such facts as are available that will impeach his accuser.

B.

After eliciting from Sanchez that the latter did not have a trunk of one Cortez in the garage, appellant offered to prove that (1) at the time of the fire Cortez had purchased an automobile and caused it to be registered in Sanchez' name; (2) it had then been transferred; (3) Mr. Cortez had paid for it by installments; (4) the title was subsequently vested in Cortez; (5) a few days before the fire Cortez discovered that this car had been by a forgery transferred back to Sanchez who (6) had immediately refinanced the car; he had promised Cortez a few days before the fire to produce the papers from Cortez' trunk which was in Sanchez' possession. After such offer appellant stated that he sought to ascertain whether Sanchez did not have such conversation with Cortez prior to the fire in which he told Cortez that he would deliver the title papers of the automobile to Cortez and immediately the fire occurred; he did not mean to say that Sanchez burned down the garage to burn up the papers but that "he might possibly have done so because it is a very serious—there is this insurance value that he did secure on that garage. I will make the offer to produce the signatures from the Division of Motor Vehicles, showing the forged signature of Mr. Cortez whereby this car was transferred to Mr. Sanchez." Objection was sustained to the offer.

In his brief appellant makes no claim that the purpose of his offer was to accuse Sanchez of forgery or arson but "rather to show the state of mind of Sanchez when Cortez would come for his papers. * * * Sanchez had the motive to testify as he did even if the fire was accidental * * * he knew in his own mind that he was the logical one to be suspected. The fact sought out on cross examination was the actual state of mind of Sanchez."

[5] No such purpose was indicated by the questions. Since Sanchez denied he

had the trunk of Cortez, how could appellant have been prejudiced by the exclusion of evidence that he did have it? The fact recited in the offer of proof had no tendency to impeach Sanchez.

C.

Subsequently, while Sanchez was under examination as to the contents of the garage he was asked whether there was some other property in the garage that did not belong to the witness.

The question on its face disclosed no materiality as to the author of the crime or how it could serve to impeach the witness. After objection had been sustained, no offer of proof was made. The question appears to have assumed that Sanchez had Cortez' trunk which had been disproved.

D.

Appellant assigns as prejudicial error that near the close of his cross-examination of Sanchez the latter was asked whether a few days before the fire he "had an argument with the owner about his moving back in that house" and whether "the owner had a right under his contract to move in that garage." Objections to the questions having been sustained, neither argument nor statement of the facts intended to be proved was offered. The second question called for a legal conclusion. The first of the questions did not on its face disclose its materiality and the argument made in the opening brief does not satisfy the lack of a statement to the court of facts appellant intended to prove.

[6,7] No prejudicial error is shown to have been committed by the court in guiding the examination of Sanchez. In seeking reversal of a judgment for the exclusion of evidence an appeal is fruitless where the appellant did not fully state the purpose of his offer and facts sufficient to demonstrate its materiality unless the question shows on its face that it was material to the issue. Also, he cannot succeed where on appeal he states a purpose different from that given at the time of his offer. People v. Rulia Singh, 182 Cal. 457, 482, 188 P. 987; People v. Brown, 43 Cal.App.2d 430, 433, 110 P.2d 1059; People v. McDonald, 110 Cal.App. 183, 187, 293 P. 883.

[8,9] In order to predicate error on sustaining objections to a question it must appear to be relevant and material and its materiality must be so patent that injury will be presumed from the adverse ruling. People v. Tou Jue, 66 Cal.App. 235, 237, 225 P. 759. The extent to which a cross-examination may be carried rests largely in the discretion of the court. People v. Serpa, 67 Cal.App.2d 327, 332, 154 P.2d 6; People v. Corlett, 67 Cal.App.2d 33, 57, 153 P.2d 595.

The judgment and order denying the motion for a new trial are affirmed.

McCOMB and WILSON, JJ., concur.

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102 Cal.App.2d 345

WILSON v. SHULTZ et al.

Civ. 17785, 18075.

District Court of Appeal, Second District,
Division 3, California.
Feb. 10, 1951.

Action by Margaret Wilson against David Shultz and Sophie Shultz for cancellation of two leases of real property and a bill of sale of personal property on ground of false and fraudulent representations. The Superior Court, Los Angeles County, Paul Nourse, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Vallée, J., held that evidence was sufficient to support findings of fraud, to connect defendants with fraud, and to establish reliance by plaintiff upon the false representations of defendants.

Judgment modified and as modified affirmed.

1. Landlord and tenant 🔑28(1)

In action by lessee against lessors of hotel and adjoining cottage for cancellation of two leases and a bill of sale of personal property, evidence was sufficient to support a finding of fraud, to connect lessors with fraud, and to establish reliance by lessee upon false representations of lessors. Civ.Code, §§ 1572, 1710.

2. Landlord and tenant ⚷28(2)

Where lessors of hotel stated to prospective lessee that prior lessee thereof had made more than figures submitted by prior lessee showing amount of business, and also that such figures were considerably less than what was actually taken in, such representations were material and actionable affirmations of fact, and having undertaken to make such representations, lessors were bound by law to make an honest statement and not conceal any fact within their knowledge which might materially qualify such statements. Civ.Code, §§ 1572, 1710.

3. Cancellation of instruments ⚷47

In action by lessee for cancellation of hotel lease, on ground of false and fraudulent representations, evidence was sufficient to warrant finding that reasonable rental value of hotel for period of lessee's occupancy was $1,512.86.

4. Cancellation of instruments ⚷47

In action by lessee for cancellation of cottage lease on ground of false and fraudulent representations, where only evidence of reasonable rental value of cottage for period of lessee's occupancy was lease which fixed rental at $361.12, court erred in finding that reasonable rental value of cottage was only $350.

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McLaughlin & Casey, and James A. McLaughlin, all of Los Angeles, for appellants.

Robert Wanamaker, John H. Poole, Pasadena, for respondent.

VALLÉE, Justice.

Appeal by defendants from an adverse judgment in an action seeking cancellation of two leases of real property and a bill of sale of personal property on the ground of false and fraudulent representations allegedly made by defendants with respect to the income received from the operation of the leased premises immediately preceding plaintiff's occupancy.

On January 15, 1949, defendants, as lessors and owners of a 30-room hotel and an adjoining cottage at Catalina Island, entered into two 5-year leases with plaintiff, as lessee, one for the hotel, the other for the cottage. Plaintiff paid defendants $8700 for advance rentals and furniture deposits under the leases, for the good will of the premises, and the transfer of the personal property. Plaintiff, an elderly woman in her late eighties, was represented throughout the transaction by John R. McCall, her son and duly appointed agent, whom we refer to as plaintiff.

Plaintiff went into possession on February 15, 1949. She and her son occupied the cottage. During her occupancy she spent some $1691.99 in improvements. In April she discovered that the income from the hotel was not as it had been represented. Prior to May 15 she told defendant David Shultz that the property had been "misrepresented" to her and that she "would like very much to get relief, and the best way is to give me my money back." Defendants refused. Plaintiff paid the rent called for by the leases up to and including May 15th. She operated the hotel until June 25, 1949. A few days later the hotel was closed. During her period of occupancy, plaintiff collected a total of $1512.86 in rentals.

On November 17, 1949, a judgment was entered for plaintiff, from which defendants appealed (No. 17785). Findings of fact and conclusions of law had been filed but through inadvertence had not been signed by the trial judge. After the appeal had been taken, on motion of plaintiff, this judgment was vacated, new findings of fact and conclusions of law were signed and filed, and a new judgment entered on May 17, 1950. The two judgments are identical in form except for their respective dates and for the amount of interest.

The judgment of May 17, 1950, decreed that the leases and bill of sale be cancelled, that defendants be restored to the possession of the real and personal property, and awarded plaintiff "the sum of $9462.44, with interest on the sum of $8700. at the rate of 7% per annum from February 1, 1949, amounting to $776.48, making a total sum of $10,238.92." Defendants also appealed from this judgment (No. 18075). There was no appeal from the order vacating the judgment entered November 17, 1949.

Defendants' principal contention is that the evidence does not support the finding of fraud. It appears that pending negotiations for leasing the premises, defendants represented to plaintiff that the gross income from the operation of the hotel for the period immediately preceding her contemplated occupancy, i.e., October, 1947, through September, 1948, was "not less" than $16,424.90, and the net profit $9,019.08, as hereafter shown. The court found that this was a representation of a material fact, was false, was made for the purpose of inducing and did induce plaintiff to lease the hotel and cottage and purchase the personal property, and was not warranted by the information then had by defendant David Shultz, that, "on the contrary, he had knowledge of facts which then did, or should have caused him to believe that the gross income," represented to plaintiff, was substantially in excess of that actually received from the operation of the hotel, and that he did not disclose the true facts to plaintiff.

We state the facts in the light most favorable to the prevailing party.

In the summer of 1947, Pearl Baird purchased the remaining term of a five-year lease of the hotel from former lessees of defendants. In July, 1948, she began to complain frequently to defendants, who were living next door in the cottage and whom she saw "practically every day," that her rent was too high and that "she wasn't making any money." In the "fall" of 1948 (the exact date does not appear) Mrs. Baird and defendant David Shultz went to a real estate broker named Poren. Poren testified that "Mrs. Baird was complaining she was unable to meet her rental payments, and Mr. Shultz and Mrs. Baird were in there to see if I could figure out an equitable proposition whereby she could pay them, and if I couldn't figure that out to see if I could dispose of the lease for her, sell the lease"; that Mrs. Baird showed him "notations she had taken from the books"; they did not show a net profit of $9,000; that he did not feel it was worth his while to attempt to sell the lease after "looking the income over and the expenses over, and that sort of thing, and what she was asking for the lease"; that at first Mrs. Baird wanted "$12,000, and later she came in and said she would take ten, and then she came in and said she would take eight, and then she said she would take six. That was the last I heard of her"; that Mrs. Baird and Shultz told him that Shultz had made one reduction on Mrs. Baird's rental payments and would consider making another.

In the latter part of August, 1948, Mrs. Baird listed the hotel lease and her linens for sale with Roy X. Long, a broker. She did not keep a regular set of books but she furnished him with the record she kept, consisting of registration cards, receipt books and daily room accounts, together with bills, vouchers and receipts showing expenses incurred during the period she operated the hotel, October, 1947, through September, 1948. Unknown to Long, among the records she gave him were fabricated guest registration cards showing receipts of fictitious room rentals during July and August. From these records, Long made a compilation showing an average monthly income of $1368.74 and the average monthly expenses of operation for the same period. The compilation showed a gross income of $16,424.90 and a net profit of $9,019.08 during that period.

In October, 1948, being in default in her rent for September and October, Pearl Baird and defendant David Shultz entered into an oral agreement whereby she surrendered her prepaid rents and security deposits, turned over the keys, the possession of the property, and her linens to Shultz, and he released her from all obligations under the lease. She was to receive $1000 for her linens as soon as he received the money from a future lease of the property. At that time an inventory of the personal property was made by Shultz and Mrs. Baird. Shultz delivered the inventory to Long and offered him a commission of $1000 if he could get him a "good reliable party" to lease the property. Shultz knew that Mrs. Baird had listed the lease and personal property with Long. Long asked him if he wanted to sell on the same terms as Mrs. Baird. Shultz said he did. For reasons not disclosed Long ostensibly continued to represent Mrs. Baird. The circumstances were such as to cause the trial court to comment that it "looks like a rather professional deal to me."

In December, 1948, Long advertised the hotel lease and the personal property for sale. Plaintiff answered the advertisement and discussed the matter with him. Long stated he represented Mrs. Baird, that $8500 was the sale price for the "transfer" of the lease, and that the rental on the premises would be $400 a month. He did not disclose the fact that Mrs. Baird had been released from the obligations of the lease or that Shultz was his principal. He showed plaintiff the compilation he had made from Mrs. Baird's records, revealing a gross income of $16,424.90 and a net profit of $9,019.08 during the period of her occupancy, and plaintiff made a notation of these figures. Plaintiff met defendant David Shultz for the first time at Catalina when she inspected the hotel. Shultz had the keys and Long introduced him as the owner. Soon thereafter, at plaintiff's request, a meeting with Mrs. Baird was arranged in Long's office. Defendants were not present. At this meeting plaintiff and Mrs. Baird discussed generally the operations of the hotel, including the income and expenses. Mrs. Baird emphatically assured plaintiff that the figures which Long had compiled from her records and which had been shown to plaintiff were correct. Mrs. Baird stated she owned everything in the hotel except the furniture. Plaintiff asked what the $8500 embraced and she said "it comprised the deposits, the good will, the inventory in the hotel." Neither Long nor Mrs. Baird informed plaintiff that she had been released from the lease.

Later plaintiff telephoned Long, telling him to make Mrs. Baird an offer, which included a note and trust deed owned by plaintiff on property in Manhattan Beach. Plaintiff was told that although Mrs. Baird was not interested in that "kind of a deal," because she wanted all cash, Shultz might be interested. Later Long telephoned plaintiff that Shultz would accept the note and pay Mrs. Baird the cash she demanded. Thereafter a meeting between plaintiff and defendants was held in Long's office. Mrs. Baird was not present. Plaintiff told Shultz that the "'one thing that is bothering me very much is this rent of $400 a month. * * * I can't be sure that this is a fair rent. This rent seems to me to be very high for a hotel of that size, particularly with a seasonal operation.' And I asked Mr. Long to present to Mr. Shultz the recap he had taken from Pearl Baird's figures. He presented not only the recap but the records of Pearl Baird that he had taken from the top of his desk to Mr. and Mrs. Shultz. Mr. Shultz looked the recap in the black book over and then handed it to Mrs. Shultz. And he said, 'Why are you concerned with the rent? I think $400 a month is a fair rent.' And I said, 'Yes, it is fair if the figures shown in this recap are the actual figures.' And Mr. Shultz said, '*I can assure you you do not have to worry about that. I know she did more than that.* * * * As a matter of fact, I can take you to Catalina Island and introduce you to people who will tell you that *she did more than these figures show here.*' And then Mrs. Shultz spoke up and said, 'Yes, as a matter of fact, I know Pearl Baird took in between $19,000 and $20,000 in the same period. She has been ill and away, and hasn't been able to keep her records up as well as she should.' And then I said, 'If there is a reasonable assurance that the $400 a month is right, because a hotel operator should not pay more than 25% of his gross income.' And Mr. Shultz said, 'You don't have any worry there. I can reassure you you will find you will take in considerably more than that; furthermore, with a reasonable operation, I can assure you you will do closer to $18,000.' Well, I felt reassured when Mr. Shultz told me this, because after all he was the owner of the hotel, and in view of the fact that he had seen the other operators operate the hotel I felt he was reasonably certain what I would be able to do there." There was also evidence that defendant Shultz told plaintiff, "I can assure you * * * that these figures [the compilation shown plaintiff by Long] *are considerably less than what was actually taken in.*" At this meeting the question of taking a new lease rather than an assignment of the Baird lease was brought up for the first time. After this meeting and on January 2, 1949, the parties went into escrow. Plaintiff inquired as to the whereabouts of Pearl Baird and was told that defendants had acquired her interest in the property. Plaintiff agreed to go on with the deal and to accept a new lease from defendants and purchase the personal property from them.

[1] The foregoing evidence, contrary to defendants' contentions, amply supports the findings of fraud, is clear and convincing, connects the defendants with the fraud, and establishes reliance by plaintiff upon the false representations of defendants.

[2] Defendants' argument that their representations were but statements of opinion is untenable under the circumstances of this case. They made positive statements, not warranted by their information, as to the amount of the income from the property. The representations were material and were actionable affirmations of fact. Civ. Code, §§ 1572, 1710. A representation concerning the past income from property has been held to be a representation of fact. Dyke v. Zaiser, 80 Cal.App.2d 639, 648–649, 182 P.2d 344; Chamberlain v. Wakefield, 95 Cal.App.2d 280, 213 P.2d 62; Spencer v. Deems, 43 Cal.App. 601, 604, 185 P. 671; cf. Costello v. Roer, 77 Cal.App.2d 174, 178, 175 P.2d 65. Having undertaken to make representations with respect to the income derived from the operation of the hotel, defendants were bound by law to make an honest statement and not conceal any fact within their knowledge which might materially qualify such statements. Dyke v. Zaiser, supra, 80 Cal.App.2d 639, 651–652, 182 P.2d 344; Rogers v. Warden, 20 Cal.2d 286, 289, 125 P.2d 7.

[3, 4] Defendants complain that in adjusting the equities between the parties the court arbitrarily made a finding as to the reasonable rental value of the hotel and cottage, unsupported by any evidence. The court found that the reasonable rental value of the hotel for the period it was occupied by plaintiff was $1512.86. The lease provided a rental of $1600 for that period. Plaintiff received rentals of $1512.86 during the period. The evidence was thus sufficient to warrant the court finding that the reasonable rental value of the hotel was $1512.86. The court found that the reasonable rental value of the cottage for the period it was occupied by plaintiff was $350. The only evidence of the reasonable value of the cottage for that period was the lease which fixed a rental of $361.12. The court therefore erred in finding that the reasonable rental value of the cottage was only $350.

The appeal from the judgment entered November 17, 1949, is dismissed. That portion of the judgment entered May 17, 1950, now reading: "Now, therefore, by reason of the law and findings aforesaid, it is hereby ordered, adjudged and decreed that the plaintiff have and recover judgment against the defendants David Shultz and Sophie Shultz, jointly and severally, in the sum of $9462.44, with interest on the sum of $8700. at the rate of 7% per annum from February 1, 1949, amounting to $776.48, making a total sum of $10,238.92, and plaintiff's costs in the sum of $124.30," is modified to read as follows: "Now, therefore, by reason of the law and findings aforesaid, it is hereby ordered, adjudged and decreed that the plaintiff have and recover judgment against the defendants David Shultz and Sophie Shultz, jointly and severally, in the sum of $9451.32, with interest on the sum of $8700. at the rate of 7% per annum from February 1, 1949, amounting to $776.48, making a total sum of $10,227.80, and plaintiff's costs in the sum of $124.30." As thus modified, it is affirmed. Respondent is allowed costs on appeal.

SHINN, P. J., and WOOD, J., concur.

102 Cal.App.2d 418

A. FARNELL BLAIR CO., Inc. v. HOLLYWOOD STATE BANK.

Civ. 17703.

District Court of Appeal, Second District, Division 3, California.

Feb. 20, 1951.

Rehearing Denied March 14, 1951.

Hearing Denied April 19, 1951.

Action by A. Farnell Blair Co., Inc., a corporation, against Hollywood State Bank, a corporation, to recover amount deducted by defendant bank from plaintiff's deposit account for alleged purpose of paying third party's indebtedness to bank on ground that such amount was owed by plaintiff to third party, a subcontractor of plaintiff, for work on a government construction job. The Superior Court of Los Angeles County, Frank G. Swain, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Shinn P. J., held that evidence was insufficient to sustain basic finding that all sums owed by plaintiff to third party under subcontract were expended by plaintiff in payment of obligations for which plaintiff was liable under government contract and surety bond.

Judgment reversed.

1. Assignments 🔑98

Assignees of a contractor of funds to be earned in public work take with notice of terms of contract and of undertaking of contractor's surety.

2. Subrogation 🔑7(1)

Where surety of construction contractor, on contractor's default, completes contract and contractee has funds in his hands earned by contractor, surety is entitled to be subrogated to rights which contractee, on contractor's default, could assert against such funds, to extent necessary to reimburse surety for outlay made to complete contract, and right to funds embraces not only retained percentages, but other funds earned by contractor remaining in hands of contractee.

3. United States 🔑67(1)

Where plaintiff contractor agreed to assignment of third party's subcontract to defendant bank and agreed to withhold sufficient amounts to assure payment of third party's obligations to bank and contractor also entered into agreement with third party for purchase of cement at stated price per cubic yard for use on government project, plaintiff's contract with government and bond did not obligate plaintiff or its surety to pay materialmen for materials furnished subcontractor to be used in mixing concrete which subcontractor was selling to plaintiff at fixed price and plaintiff's statutory bond did not impose such an obligation. Miller Act, § 2(a), 40 U.S.C.A. § 270b(a).

4. Assignments 🔑94

Where subcontractor under his agreement with plaintiff contractor was entitled to receive his gross earnings and did not agree with plaintiff that it could appropriate those earnings in furtherance of performance of his obligations, and with plaintiff's consent, subcontractor assigned subcontract to bank, subcontractor's rights passed to bank and thereafter subcontractor and plaintiff could not alter their contractual obligations to detriment of bank and if plaintiff chose to voluntarily use subcontractor's money in such a way that subcontractor and bank would get none of it, consequences were plaintiff's own responsibility.

5. Appeal and error 🔑1008(1)

In action by plaintiff contractor against defendant bank to recover sum deducted by bank from plaintiff's deposit account for payment of indebtedness of subcontractor who had assigned subcontract to bank after plaintiff agreed to withhold sufficient funds to assure payment of subcontractor's obligation, whether plaintiff was required to supply information to bank with regard to subcontractor's obligations, whether bank was justified in relying and acting on plaintiff's representations and omissions and whether bank relied and acted on same to its detriment in its dealings with subcontractor and whether plaintiff was therefore estopped from recovering sum deducted from its account by bank were questions of fact for trial court.

6. Assignments 🔑137

In action by plaintiff contractor against defendant bank to recover sum deducted by bank from plaintiff's deposit account for payment of indebtedness of subcontractor who had assigned subcontract to bank after plaintiff agreed to withhold sufficient funds to assure payment of subcontractor's obligations, evidence was insufficient to sustain basic finding that all sums due subcontractor under subcontract were expended by plaintiff in payment of obligations for which it was liable under government contract and surety bond because of subcontractor's failure to pay such obligations.

McClean & Petty and Walter G. Danielson, Los Angeles, for appellant.

Crider, Runkle & Tilson, Los Angeles, for respondent.

SHINN, Presiding Justice.

This action arose out of a controversy between plaintiff, a government contractor, and defendant bank over part of the earnings of a subcontractor, who was also a supplier of material to the contractor. The bank claimed as assignee of the earnings in question. The contractor claimed to have expended all the money in the payment of claims against the subcontractor having priority over the rights of the bank. There was also involved a special agreement of the contractor to withhold from payments earned by subcontractor sufficient to pay the loans of the bank. The dispute arose in the following manner.

In January, 1946, one Blair received a contract from the United States Government for construction work at Camp Pendleton, Oceanside, which he assigned to plaintiff corporation. Plaintiff assigned to defendant bank all sums to be earned under the contract and from then on the bank financed plaintiff's operations. On or about February 9, 1946, plaintiff gave one Cook a purchase order for mixed concrete at $8 per cubic yard to be used by plaintiff in performance of the general contract. On February 28, 1946, by subcontract, plaintiff let to Cook certain asphaltic concrete work on the job for a price of $79,314. By additions and deletions this price was increased to $96,613.74. Cook, having been introduced at the bank by plaintiff, had borrowed money at different times upon certain security all of which was repaid. He carried on his work under both agreements and by November 25, 1946, had earned considerable sums of money. He then applied to the bank for further financing and arranged to assign to the bank sums due and to become due under the purchase order and subcontract. The bank's credit manager arranged with plaintiff for its consent to the assignment by Cook on terms which were stated in plaintiff's letter to the bank of November 25, 1946, reading as follows:

"Mr. Richard Neiderhouser,
"Hollywood State Bank,
"6801 Santa Monica Boulevard,
"Los Angeles, California.

"Subject: Assignment of Subcontract of Cal Cook to Hollywood State Bank, A. Farnell Blair Navy Contract NOy-13047

"Dear Sir:

"This will confirm my telephone conversation with you of today regarding the caption subject.

"Please be advised that we are agreeable to Mr. Cook's assignment of his sub-contract with us to the Hollywood State Bank.

"This is to further advise you that we will protect this assignment by withholding the final payment or necessary payments to assure you the remaining balance due you from Mr. Cook as of that date.

"Upon my return to the city next Saturday, I will be able to advise you the amount due Mr. Cook on his next partial payment.

"Very truly yours,
"A. Farnell Blair Co., Inc.
"C. B. Antill
"Vice President and General Manager."

A few days later Cook delivered to the bank the purchase order and the subcontract, and assigned to the bank all of his right, title and interest in and to monies then due or to become due thereunder. Between that date and March 30, 1947, the bank made nine separate loans to Cook.

Under the purchase order Cook was entitled to receive the full amount of his invoices for concrete delivered. Under the subcontract, work was to be paid for as it was placed in position upon invoices furnished by Cook, 10 per cent being withheld by plaintiff until completion and approval of the work and the production of evidence that Cook's material and labor bills had been paid. Cook proceeded with performance of both agreements as hereinafter stated.

The subcontract provided as follows: "Third. The Sub-Contractor will prosecute the work with due diligence, without delay, and will not in any manner, by delay or otherwise, interfere with the work of the Contractor, or other Sub-Contractors, and should the Contractor conclude that the Sub-Contractor is delaying the work, he shall so notify the Sub-Contractor, who shall immediately thereafter, furnish whatever materials are required by the Contractor, and in case the Sub-Contractor fails to comply with these demands, the Contractor shall have the right to furnish all materials and employ any additional men and charge the expense thereof against the Sub-Contractor, and deduct same from any monies due or to become due by this contract, and should the amount or balance due on said contract be insufficient, to collect said deficiency by legal process."

Plaintiff gave Performance and Payment Bonds under the base contract pursuant to the Miller Act (Title 40 U.S.C.A. § 270a et seq.).

The rights of the parties *under the subcontract* may be stated broadly as follows: The bank had a right to receive Cook's gross earnings under the subcontract less any deductions which might result from the exercise by plaintiff of one or more of the following rights: (a) Upon notice to Cook, in case the work was being delayed, to furnish any material and labor pursuant to paragraph 3 of the agreement and to charge Cook with the cost; (b) upon cancellation of the subcontract for Cook's default or upon abandonment by Cook to finish the job and deduct the cost from Cook's earnings; (c) to pay and discharge Cook's obligations for labor and material furnished by him for which plaintiff and its surety were liable under the government contract and bonds.

The rights of the parties under the concrete purchase agreement were the following: Plaintiff had a right to deduct from Cook's gross earnings sums paid to Cook's creditors for which plaintiff and its surety were liable under the government contract and bonds; the bank was entitled to the remainder.

The controversy arose as follows: Cook had been performing under the two agreements and by November 25, 1946, although he had earned considerable sums of money, was indebted to plaintiff in the principal sum of $7,963.78, balance of a demand note he had given plaintiff in March, 1946, and in certain other amounts. After November 25th he proceeded with the performance of both agreements, and upon invoices furnished by him plaintiff paid by checks, payable to Cook and the bank jointly, and delivered to the bank, the amounts of Cook's earnings after making certain deductions, to which we shall refer later. Upon the basis of Cook's invoices the bank continued to loan him money once or twice a month. The total amount paid to the bank under the subcontract was $45,909.31 and under the purchase order $50,719.96. Plaintiff made no payment to the bank under the subcontract after February 27, 1947, and paid nothing on the purchase order after March 17, 1947. On April 1st Cook owed the bank on notes $41,336.92, which included a loan of $10,000 made to him on that day. On May 29, 1947, the bank deducted $25,000 from plaintiff's deposit account, and on or about October 2, 1947, deducted further sums amounting to $17,445.82 and applied the same to extinguish Cook's indebtedness of $42,445.84. Plaintiff sued for the recovery of this sum and was given judgment for about $32,000. For the reason that plaintiff had given the bank false credit information as to Cook's standing under the agreements at the time the bank made its last loan plaintiff was held estopped to recover $10,000 of the sums deducted from its deposit account. The bank appeals.

Plaintiff took over the subcontract work from Cook August 20, 1947. Although the court did not make a finding that Cook had abandoned the work the evidence indicated that he had done so. On June 25, 1947, a receiver took charge and possession of his business, but his possession was of short duration. In July Cook filed a petition in bankruptcy. Testimony was given by Mr. Kite, plaintiff's vice-president and local manager, as to the conditions under which plaintiff took over the work. He was asked whether plaintiff at any time undertook performance of any portion of the contract and testified: "May I ask a clarifying question?

"Q. Yes. A. Does the fact that we furnished men at various times throughout the job to do various and sundry odd jobs for Cook constitute our performing part of the contract?

"Q. No, I have in mind the time when your company stepped in and took over the job and began the performance of any unfinished work? A. Yes, we did.

"Q. On what date was that?

"Mr. Runkel: I believe that is what we previously agreed on. A. August 20th.

"Mr. Runkel: By the letter of August 20, 1947, which, however, followed previous orders that were in the nature of warning and trying to get Cook to perform.

"Mr. Danielson: It will serve our purpose if we stipulate as of August 20, 1947, the plaintiff stepped in for the purpose of performing any balance of work required under CFO–112. Is that stipulated?

"Mr. Runkel: Yes. * * *

"Q. By Mr. Danielson: And up to that time, then, Cook was performing his contract? A. He was not.

"Q. Well, was there anyone else performing it on his behalf? A. There was no one performing it." The subcontract work was at a standstill. Plaintiff let a subcontract to one McClanahan for completion of this work and paid him on November 7, 1949, $19,509.13 and also paid for patching Cook's work on the same date, $1,287.98. There appears to have been little or no activity on the subcontract work between June 25th and the date of the contract with McClanahan.

The principal evidence as to the status of the two accounts was that furnished by plaintiff's books. A summary that was received in evidence well illustrates the problem that confronted the trial court, but does not, by any means, furnish a solution. According to the summary Cook was credited with $96,613.74, the amount of the subcontract, and $144,691.44 for concrete and other materials delivered under the purchase order, making a total of $241,305.18 total earnings. He was paid $45,909.31 on the subcontract and $103,839.72 under the purchase order, or a total of $149,749.03. He was charged with numerous items which amounted to $86,803.32. Upon these figures a balance was shown in Cook's favor of $4,752.83. Evidence as to other items, amounting to $5,549.57, which were not on the summary, overcame this balance and left Cook indebted in the sum of $796.74 and brought the total charges against the two contracts to $92,352.89.

Cook earned under the *subcontract* $96,613.74; the cost of completion and patching was $20,797.11 leaving net earnings of $75,816.63. Since the bank was paid on account only $45,909.31 the balance of Cook's earnings not paid to the bank was $29,907.32. Although plaintiff paid nothing under the purchase order after March 17, 1947, Cook was credited with deliveries through June and charges were entered against him for April, May and June. Between November 29, 1946 and April 1, 1947, Cook earned *under the purchase order* $71,097.82. The bank was paid $50,719.96, leaving a balance of $20,377.86 of earnings that were not paid to the bank. The total earnings not paid to the bank were $50,285.18 (this is exclusive of concrete deliveries after April 1st which amounted to $13,679.55). The gross earnings of Cook under each contract were stated separately in the summary but the charges against him were not segregated to show which were made against the subcontract earnings and which were charged against the earnings under the purchase agreement.

The dispute concerns the propriety of plaintiff's counter charges. Except as to the payment to McClanahan of $19,509.13 for completion of the work, and the item of $1,287.98 for repairing some of Cook's work, the bank's objections run to practically all of the counter charges. The court made the following finding: "Said Cook failed fully to pay the bills and claims incurred by him for labor and material furnished to him for use in, and which were used by him in the performance of said *purchase order and said subcontract,* and plaintiff was forced to and did pay said bills and claims by virtue of plaintiff's obligations under said general contract and said payment bond and said performance bond. Plaintiff expended sums *for the completion of said subcontract* of said Cook *and for the payment of said bills and claims against said Cook for labor and material* in an aggregate amount in excess of the balance of the contract price otherwise due from plaintiff to Cook from and after March 17, 1949 [sic]."

Plaintiff contends that this finding is a complete answer to the contention that greater sums were earned by and payable to Cook than were paid to the bank. It maintains that it had the right to apply all Cook's earnings under the subcontract *and* the purchase agreement to the payment of Cook's indebtedness to it existing on November 25th, and to all his obligations for labor and material of whatsoever nature incurred in his operations under both contracts. It also says as to the subcontract: "The bank obviously did not become entitled to the gross amount of the subcontract price. Cook had to perform his subcontract before any money was earned by him. Obviously Cook could not retain anything from the subcontract price except the profit that he made in performing the contract. This was the limit of Cook's rights. It was, therefore, the limit of the rights obtained by the bank by virtue of its assignment." The bank contends that it was necessary for the court to compute separately Cook's earnings under the subcontract and the purchase agreement, and to ascertain the sums that were deductible under each agreement; it was plaintiff's duty under the November 25th letter agreement to pay over to the bank Cook's gross earnings under the subcontract minus only sums properly chargeable against his earnings under that agreement; counter charges or offsets against Cook's earnings under one agreement were not deductible from his earnings under the other.

The court did not make any finding as to the gross amount earned by Cook under either agreement, nor as to the amount that was deductible from his gross earnings under either agreement. We shall consider first the bank's contention that the quoted finding does not determine the principal issue or furnish support for the judgment. As between plaintiff and the bank Cook's assignments to the bank represented separate transactions. Although as between plaintiff and Cook the latter's obligations under one contract might have been charged against his earnings under the other, as was done in the accounting rendered by plaintiff, this could not be done to the detriment of third parties who had claims upon his earnings under either contract or under both. And it was especially necessary for the court to find specifically as to the status of the account under the subcontract. Plaintiff's letter of November 25th was written in response to the bank's inquiry as to whether plaintiff would protect the bank's loans if it took an assignment of the subcontract. The letter expresses an unequivocal and unconditional promise of plaintiff to withhold and make available to the bank from Cook's earnings *under the subcontract* a sufficient sum to pay in full Cook's indebtedness to the bank at the time the contract came to an end. There was no agreement that plaintiff might deduct from those earnings any charges for which Cook might be liable *under the purchase agreement.* It was not shown that the bank had knowledge of or consented to any such deductions. Although plaintiff did on February 27, 1947, deduct from Cook's earnings under the subcontract $5,384.42, made up of items which appear to have pertained to the purchase agreement, there was nothing in the memorandum submitted by plaintiff to the bank at that time to indicate, nor did the bank have knowledge, that these charges did not pertain to the subcontract.

Upon the trial plaintiff did not undertake to prove which of its counter charges or offsets arose out of the subcontract as distinguished from the purchase agreement.

It merely asserts now that they all related to the work which it was required to perform for the government and says further, with relation to all of the items: "There is no evidence whatsoever that any one of these offsets did not arise out of or was not connected directly with Cook's subcontract." Plaintiff had superior knowledge of the facts, and the burden was upon it to prove which charges were against the subcontract earnings, and that they were proper charges. It not only failed to do so but has not attempted to point out any evidence which would prove that its several charges were against one agreement or the other. It did, however, deduct from Cook's earnings under the subcontract certain amounts for application upon a note for $15,000 which Cook had given in March, 1946, and, as we have said, among its charges was the amount paid to McClanahan for completing the job and the sum of $1,287.98 for patching Cook's work. It is not questioned that the last two sums were properly deducted from the earnings under the subcontract. Upon the other hand the bank lists items amounting to $33,231.52 charged against Cook's total earnings which it asserts related exclusively to the purchase order. We find no denial of this statement in plaintiff's brief. There was evidence that of this total $17,364.48 was paid to Riverside Cement Company for cement, which had nothing to do with the subcontract. Plaintiff gave Cook three checks amounting to $2,350 which, so far as the record shows, were loans which plaintiff collected by deducting the amount from Cook's earnings. It would serve no purpose to enumerate the many other items. Findings were required as to the disbursement of Cook's money, stating as to each item whether it was taken from earnings under the subcontract or the purchase order. These are questions of fact as to which the evidence is incomplete and inconclusive. We cannot undertake to decide them.

[1, 2] The finding that "plaintiff was forced to and did pay said bills and claims by virtue of plaintiff's obligations under said general contract and said payment bond and said performance bond" is not supported by the evidence. Under the purchase order Cook did no work of installation. He was only a materialman. Plaintiff's obligations to him under the purchase order differed materially from those under the subcontract. Plaintiff argues that it was obligated under the base contract and that its surety was bound to pay all debts incurred by Cook in the work and for that reason it had a right to apply all earnings under both contracts to the payment of Cook's labor and material bills, and any other bills, as long as the money was used for Cook's benefit under his agreements. The trial court evidently adopted this theory. The principal authorities relied upon by plaintiff are the following: First Nat. Bank of Seattle v. City Trust, Safe Deposit & Surety Co., 9 Cir., 114 F. 529; Title Guaranty & Surety Co. v. Dutcher, D.C., 203 F. 167; American Bonding Co. v. Central Trust Co., 7 Cir., 240 F. 400; New Amsterdam Casualty Co. v. City of Astoria, D.C., 256 F. 560; Pratt Lumber Co. v. T. H. Gill Co., D.C., 278 F. 783; Exchange State Bank v. Federal Surety Co., 8 Cir., 28 F. 485; Farmers' Bank v. Hayes, 6 Cir., 58 F.2d 34; Moran v. Guardian Casualty Co., 64 App.D.C. 188, 76 F.2d 438; United States Fidelity & Guaranty Co. v. Sweeney, 8 Cir., 80 F.2d 235; Standard Accident Ins. Co. v. Federal Nat. Bank, 10 Cir., 112 F.2d 692. These were all cases involving claims of sureties to preferred rights where they had paid or would be required to pay labor and material claims under contracts for public work, the funds involved being those on hand after completion of the work by the contractor or by the surety following abandonment of the work by the contractor. They all fall within the following rules: Assignees of a contractor of funds to be earned in public work take with notice of the terms of the contract and of the undertaking of the contractor's surety. New Amsterdam Casualty Co. v. City of Astoria, supra, D.C., 256 F. 560. "Where a surety of a construction contractor, upon the contractor's default, completes the contract, and the contractee has funds in his hands earned by the contractor, the surety is entitled to be subrogated to the rights which the contractee, upon the contractor's default, could assert against such funds, to

the extent necessary to reimburse the surety for the outlay made to complete the contract. This right to the funds embraces not only retained percentages, but other funds earned by the contractor remaining in the hands of the contractee." Standard Accident Ins. Co. v. Federal Nat. Bank, 10 Cir., 112 F.2d 694. The bank does not question that both plaintiff and its surety had a right to finish Cook's uncompleted subcontract work and to charge the cost against the amounts that Cook had earned and the balance of the contract price which remained unearned. This right was in addition to the provision of paragraph 3 of the agreement under which plaintiff could, in certain conditions, supply necessary labor and materials to accelerate or finish the work at Cook's expense. Plaintiff was obligated by its contract to pay all labor and material bills which it incurred in the prosecution of the work. Its surety was likewise obligated under the Miller Act (40 U.S.C.A. sec. 270a et seq.) Although the bank does not deny that plaintiff had a right under paragraph 3 of the subcontract to take charge of the work and furnish labor and material at Cook's expense plaintiff did not operate under this provision and does not base its claims thereon. After August 20th, when Cook was displaced, the job remained idle until McClanahan took it over.

[3] Plaintiff's liability under the contract and bond ran to all obligations of Cook for material and labor which he furnished under the *subcontract*. These would have to be satisfied eventually by plaintiff and its surety if Cook failed to meet them. Plaintiff and its surety were also obligated under the government contract and bond to pay Cook for all materials which he furnished as a materialman under the purchase order. Payment to Cook for such materials would have satisfied any obligation of plaintiff and its surety under the contract and bond, so far as the materials were concerned, and payment to the bank as Cook's assignee would have been equivalent to payment to Cook. But the contract with the government and the bond did not obligate plaintiff or its surety to pay materialmen for materials furnished Cook to be used in mixing concrete which Cook was selling to plaintiff at a fixed price per cubic yard. Section 270b (a) [1] of the Miller Act and the statutory bond do not impose such an obligation. It was said in Clifford F. MacEvoy Co. v. United States, for Use and Benefit of Calvin Tomkins Co., 322 U.S. 102, 64 S.Ct. 890, 892, 88 L.Ed. 1163: "Specifically the issue is whether under the Miller Act a person supplying materials to a materialman of a Government contractor and to whom an unpaid balance is due from the materialman can recover on the payment bond executed by the contractor. We hold that he cannot." MacEvoy held a construction contract with the government, purchased materials for use in the prosecution of the work from James H. Miller & Company who, in turn, purchased the materials from Calvin Tomkins Company but failed to pay the latter. Tomkins, after notice given to MacEvoy, brought suit against him and his surety.

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[1] "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed."

After examination of the Act and its history it was held that the word "subcontractor" was used in the proviso of section 2a in its technical sense so as to exclude materialmen and laborers. Liability on the bond did not run in favor of Tomkins as a supplier of materials to a materialman. Plaintiff, here, in purchasing materials for Cook and in paying his obligations with respect to the purchase of materials for use in mixing concrete acted outside the scope of its obligations under the government contract.

On December 3, 1946, Cook owed Riverside Cement Company $8,917.12, presumably for cement purchased for use in carrying out his agreement to furnish plaintiff with concrete. On that day plaintiff guaranteed payment of Cook's account then due and also payment for future deliveries to him for material to be supplied to plaintiff. The cement company continued to sell to Cook and there was owing on February 20, 1947, $16,970.88. The total balance was not paid by plaintiff until the following November. Although this cement was used by Cook in supplying plaintiff with concrete plaintiff paid him nothing for it, but after the two contracts were completed paid the cement bill directly to Riverside Cement Company, using money then due Cook for that purpose. Plaintiff made other purchases of cement in large amounts for Cook's use and charged the same to his account. Its charges also included a multitude of items for labor and materials furnished, gasoline purchased, truck drivers' wages and demurrage paid on freight shipments.

We think it would be helpful to mention several other transactions in which plaintiff laid out money. It will serve to point out that a great deal of the money appears to have been used to pay for material which went into the concrete Cook was selling to plaintiff. It will also furnish a basis for our discussion of the bank's further contention that plaintiff's disbursements were, in large part, not the payment of obligations incurred by Cook for which plaintiff was liable, but merely loans to Cook as to which it became a general creditor. Plaintiff deducted from Cook's earnings $8,574.51 for rental of trucks equipped with concrete mixing attachments. This equipment was rented to Cook by a corporation wholly owned by Mr. Blair, who is the sole owner of plaintiff corporation. Plaintiff also paid substantial bills for truck drivers' wages and for demurrage on freight shipments to Cook. The nature of the materials shipped is not explained. There were also substantial purchases of gasoline, but whether for use under the subcontract or in the furnishing of concrete is not disclosed by the evidence. The question arose whether such items of indebtedness were within the liability of the contractor and his surety where the things were furnished to one who was merely supplying material to the contractor. Although there was evidence that the cement purchased from Riverside Cement Company was used in the mixing of concrete, and it appears probable that many of the other items were furnished to Cook as a materialman, these were factual questions for the trial court. It does appear to us, however, that if a contractor on government work is liable for gasoline furnished to a materialman for use in trucks which he has rented to transport and mix materials into concrete which he is selling to the contractor there would be no end to the chain. When it is determined which of the questioned transactions related to the subcontract and which to the purchase of concrete the decision and the reasoning of the MacEvoy case will furnish answers to the questions we have just mentioned.

[4] The foregoing applies to all transactions which may be determined not to have been loans as to which plaintiff would be a general creditor. A further contention of the bank is that in most instances of assistance given Cook plaintiff was merely advancing him money, material or credit, without any obligation to do so, and became as to such loans a general creditor. This would appear to be true as to all cash advances and some of the other transactions. The bank, of course, would have preferred rights as against subsequent loans made by plaintiff, whether of money or material, which were to be repaid from Cook's earnings. Plaintiff is correct in saying that an assignee stands in the shoes of his assignor and that the bank acquired no greater rights than Cook had. But those

rights were the ones which arose out of the agreements and which existed at the time of the assignments. Cook, under his agreements, was entitled to receive his gross earnings. He did not agree in his contracts with plaintiff that the latter could appropriate those earnings in furtherance of performance of his obligations as it might see fit. Cook's rights passed to the bank. Thereafter Cook and plaintiff could not alter their contractual obligations to the detriment of the bank. If the rights of assignees could be defeated by such subsequent voluntary arrangements the financing of construction contracts would be a hazardous business. And it must be remembered that plaintiff had a definite obligation under its letter agreement with respect to the handling of money earned by Cook. If it chose to voluntarily use Cook's money in such a way that Cook and the bank would get none of it the consequences are its own responsibility.

Each party accuses the other of negligence and asserts its own freedom from negligence, contending that the loss should fall upon the other. The rule that "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer" (Civ. Code, sec. 3543) would seem to work both for and against each of them. The bank kept on loaning money to Cook, relying upon plaintiff to look after its interests. Plaintiff, having obligated itself to see that Cook's loans were repaid, was apparently indifferent as to the amounts and status of the loans, and as to whether Cook repaid them. There was no finding of negligence against either party, nor was negligence established as a matter of law. Only the trial court can determine the factual questions involved in the claims of negligence.

[5] It was alleged in the bank's answer as a separate defense that: "During all of the times between said November 29, 1946, and April 3, 1947, plaintiff represented to defendant that said Cook was duly and regularly performing and discharging the said subcontracts and that plaintiff was protecting the assignment of Cook of said funds due or to become due under said subcontracts and that plaintiff was withholding sufficient funds to insure payment to defendant of all loans and advances made to Cook. Defendant further alleges that on or about April 1, 1947, at a time when Cook was indebted to defendant in the sum of $31,336.92, plus certain accrued interest, said Cook made application of defendant for a further loan of $10,000.00, whereupon defendant inquired of plaintiff as to the status of said sub-contracts and plaintiff advised defendant, in writing, that said Cook could expect to receive, within the next 45 days, the sum of $44,063.27, and that in addition thereto said Cook would receive upon the completion of the sub-contracts the sum of $9,745.69. Thereupon and in reliance upon said representations of plaintiff, defendant, on April 3, 1947, loaned to said Cook said additional sum of $10,000.00. * * * By reason of the agreement as afore alleged that plaintiff would recognize and protect the assignment by Cook, to defendant of funds due or to become due under said subcontracts and would insure and guaranty payment to defendant of all sums due from Cook upon the completion of said subcontracts, and the representations made by plaintiff to defendant from time to time that said Cook was properly discharging and performing said subcontracts and the further representations at the time defendant made its last loan to Cook on April 3, 1947, which brought his indebtedness to the defendant to the sum of $41,336.92, plus interest, that said Cook within forty-five days from April 1, 1947, would receive the sum of $44,063.27 and the additional sum of $9,745.69 upon the completion of the subcontracts, and upon all of which agreements and representations defendant relied in making said loans to Cook and without which agreements and representations, defendant would not have made said loans, plaintiff is estopped from asserting that its indebte*n*dess to Cook is in any sum less than the amount required to pay in full said obligations of Cook to defendant or that defendant was without right to off-set said indebtedness against said indebtedness to the plaintiff." The court found that on or about April 1, 1947, plaintiff wilfully gave the bank false in-

formation as alleged in the bank's answer, and that by reason thereof the bank made an additional loan to Cook of $10,000. Plaintiff's recovery was reduced to the extent of $10,000 under the doctrine of estoppel. The court made no other finding as to this defense of estoppel. Neither did it conclude as a matter of law that plaintiff was or was not estopped as claimed in the special defense. Plaintiff, while insisting that the findings are sufficient to dispose of all the issues, claims that if a specific finding had been made upon the allegations of the affirmative defense it would necessarily have been adverse to defendant. We cannot agree with either contention. The findings are silent as to the facts pleaded. The evidence and inferences that could reasonably have been drawn therefrom would have supported an affirmative finding on the estoppel issue. On November 25, 1946, Cook was indebted to plaintiff on past transactions in the sum of $14,753.66, including a balance on the note of $7,963.78. The note indebtedness was deducted from plaintiff's checks to the bank in January and February, 1947, and plaintiff either made deductions of the remainder of the past indebtedness from its remittances or offset the same against Cook's earnings. The bank had no knowledge of this past indebtedness. Neither was it advised by plaintiff of Cook's indebtedness for cement or plaintiff's guaranty of the account on December 3, 1946. There was evidence to be evaluated by the trial court that plaintiff represented to the bank that Cook's work was progressing satisfactorily, even as late as April 1, 1947, and also evidence from which it could have been inferred that the bank relied upon the representations and silence of plaintiff and was thereby influenced to make further loans to Cook. The entire evidence along this line presented questions of fact as to what the duties of plaintiff were with reference to supplying information to the bank, whether plaintiff was guilty of breach of duty, what its motives were, to what extent the bank was justified in relying and acting upon plaintiff's representations and omissions, and whether it did rely and act upon the same to its detriment in its dealings with Cook. The principle by which the conduct of the parties must be judged is stated in section 1962, subd. 3 of the Code of Civil Procedure: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot in any litigation arising out of such declaration, act, or omission, be permitted to falsify it". An estoppel necessarily results when this factual basis has been established. Unless the several elements of estoppel are established by unconflicting evidence or by findings of a trial court the rule cannot be applied on appeal. Defendant's contention that we should hold as a matter of law that plaintiff is estopped is just as untenable as plaintiff's contention that we should hold to the contrary. The issue must be retried. The failure of the court to make findings upon this affirmative defense would, in itself, require a reversal of the judgment.

From December, 1946, through March, 1947, plaintiff deducted from checks sent to the bank a total of $20,792.21, included in which were charges against Cook for debts existing November 25th and also various claims arising later. The memoranda that went with the checks contained notations such as "Less B/C No. 59–290.05; less 12% to apply on note 2739.36; Natl. Equip. Inv. 940" etc. Most of the notations were like the first of these. No explanatory information was given the bank. As to these payments the court found: "Through said letters of transmittal defendant received notice and knowledge of said deductions and of the obligations of said Cook to plaintiff on account of which said deductions were made, and despite such notice and knowledge, defendant made no objection to any of said deductions and received and accepted and cashed said checks evidencing said progress payments from plaintiff to said Cook, and after receiving such notice and knowledge defendant continued to make additional loans to said Cook." The court stated the following conclusion of law: "Defendant consented to the deductions made by plaintiff from payments of installments of contract price which were made prior to April 1, 1947 and waived the right to object to such deductions." The bank contends that this finding is unsupported by the evidence and that the conclusion of law is erroneous. It argues that the failure to object was clearly shown to have been an oversight and that there was no evidence of an intention to waive any rights under the assignments. It is to be noted that the finding is only that the bank waived its right to receive certain sums which were withheld by plaintiff and that there was no finding that there was a waiver of the bank's right to require plaintiff to live up to its promise expressed in the letter of November 25th. This entire issue must be retried. More is involved than is covered by the finding. It would serve no purpose to discuss the claim of insufficiency of the evidence to support the finding that was made.

[6] The judgment must be reversed for insufficiency of the evidence to support the basic finding that all the sums in question were expended by plaintiff in payment of obligations for which it was liable under the government contract and the surety bond. The failure to find on the defense of estoppel is an additional ground for reversal.

The judgment is reversed.

WOOD and VALLÉE, JJ., concur.

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102 Cal.App.2d 385

In re FRITZ'S ESTATE.

FRITZ v. KILFOY et al.

Civ. 18153.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1951.

Rehearing Denied March 7, 1951.

Hearing Denied April 19, 1951.

Proceeding in the matter of the estate of John H. Fritz wherein Catherine Fritz filed a petition to probate a will opposed by Edward J. Kilfoy and another. The Superior Court, Los Angeles County, John Gee Clark, J., entered a judgment denying proposed will to probate and petitioner appealed. The District Court of Appeal, Moore, P. J., held that where a letter by testator to devisee did not incorporate prior will by reference, and letter did not dispose of property, or appoint an executor or name a guardian, and letter was not intended to be integrated with the will, but merely expressed desires of the testator, trial court properly rejected letter as a testamentary instrument.

Affirmed.

1. Appeal and error 🔑996

When two or more inferences can reasonably be drawn from established facts, reviewing court may not substitute its deduction for those drawn by trial judge, and such rule is not relaxed in contests involving validity of a will.

2. Wills 🔑324(1), 386

The weight of the evidence and credibility of witnesses in a will contest are for jury and the trial court, and any substantial evidence will support the finding in a probate proceeding.

3. Wills 🔑386

Whether two writings by a testator were, or were intended by him, to be integrated in order to effect his testamentary purposes is a question of fact and the finding of such issue, if supported by substantial evidence, will not be disturbed on appeal.

4. Wills 🔑97

To be effective as an integral part of a will, separate document must be dispositive and actually attached to the will, or by its contents disclose that it was intended to supplement the will.

5. Wills 🔑97

Where there is no extrinsic evidence of testator's intention to have his will consist of various pages, they will not be so regarded by the courts unless context indicates such a coherency as to constitute one continuous composition.

6. Wills 🔑471

A clear and distinct devise or bequest cannot be affected by any other words not equally clear and distinct. Probate Code, § 104.

7. Wills ⚷97

Where a holographic will was complete in all respects except for its date, and it made a positive disposition of the entire estate, a subsequent letter by testator to one of the devisees giving suggestions and advice as to which shares of stock devisee should hold but intimating not even the slightest change in the will as written, was not effective as a testamentary instrument and could not be incorporated as part of the will.

8. Wills ⚷97

While two or more separate writings may constitute one will when they bear either mechanical evidences of the testator's intention or internal proof that the author intended both to be one, yet the absence of a date or a testamentary intent in one document cannot be supplied by another totally disconnected instrument.

9. Wills ⚷97

Where subsequent letter by testator to a devisee did not incorporate the prior will by reference, and letter did not dispose of property, or appoint an executor or name of guardian, and letter was not intended to be integrated with the will, but merely expressed desires of the testator, trial court properly rejected letter as a testamentary instrument.

10. Wills ⚷130

In the construction of a holographic will, the phrase "December 1946" was an improper date and invalidated the will. Probate Code, § 53.

Louis J. Euler and Geo. W. Rochester, and Frank P. Doherty, Los Angeles, for appellant.

Freston & Files, J. R. Files and Sydney Wetzler, Los Angeles, for contestant and respondent.

MOORE, Presiding Justice.

The court having determined by its finding that a dated letter written by the hand of decedent was not intended to be integrated with a holographic will that lacks a complete date, the question presented for decision is whether such finding may be annulled despite the fact that it is supported by substantial evidence.

John H. Fritz deceased October 1, 1949, leaving an estate and two writings, namely, (1) a holographic instrument, herein referred to as "the will," dated December 1946 naming Catherine Fritz as executrix of his estate, several specific bequests to designated persons, and "out of remainder of my estate one third to Catherine Fritz, my niece"; (2) a letter to Catherine dated "12-24-1947" as follows: "I suggest or recommend to you to keep the following securities or stock for your share of my estate as they have always paid good returns. Always salable. Swift & Company stock, Bank of American stock, Standard Oil of California, Pullman Company stock. Don't get married to good for nothing fellow that will spend all your money. You will get along on what I leave you if you are careful and hope our good God and his blessed mother will always take care of you. You have been good and kind to me. Save your money and don't be foolish. Everybody loves you as long you can contribute to them, but no one wants you when you have nothing. I have always given good advice and try and to make your will and leave for charity or education for the poor unfortunates."

October 4, 1949, Catherine filed her petition to probate the will. Twenty days thereafter she filed her second petition for probate of the will and the letter as one integrated holographic will. Upon a trial of the issues raised by the opposition to the probate, Dr. Edward J. Kilfoy, a nephew of decedent, the court below made findings and decision in substance as follows: The document bearing the incomplete date "December 1946" is entirely written and signed in the handwriting of decedent who was at the time competent and acting freely and voluntarily, was in good health and had a sound and disposing mind. The "letter to Cathrin" dated "12-24-1947" is entirely written, signed and dated in the handwriting of decedent who was at the time competent and acting freely and voluntarily and was in good health and of sound and disposing mind. It is not true that the "letter to Cathrin" is testamentary in character or that decedent intended that the document dated "December 1946" and the "letter to Cathrin" should be integrated or incorporated by reference as his last will and testament. (Other findings are not pertinent to the issue on this appeal.)

The Findings are Justified.

[1-3] When two or more inferences can reasonably be drawn from established facts the reviewing court may not substitute its deductions for those drawn by the trial court. Crawford v. Southern Pacific Company, 3 Cal.2d 427, 429, 45 P.2d 183. Such rule is not relaxed in contests involving the validity of a will, but the weight of the evidence and the credibility of the witnesses are for the jury and the trial court. Any substantial evidence will support the finding in a probate proceeding. In re Estate of Downey, 51 Cal.App.2d 275, 285, 124 P.2d 637. Whether two writings by a testator were, or were intended by him, to be integrated in order to effect his testamentary purposes is a question of fact and a finding on such issue, if supported by substantial evidence will not be disturbed on appeal. See In re Estate of Goldsworthy, 54 Cal.App.2d 666, 670, 129 P.2d 949.

Dr. Kilfoy was decedent's attending physician at the time of his decease. Promptly following death the doctor visited his uncle's apartment for the purpose of obtaining the addresses of relatives. Catherine who had been housekeeper for decedent led Edward to the closet in which the lists of kin were found in a shirt box. At his request she took the will from the bottom of the box. It was in a used, brown manila envelope, unsealed, postmarked January 26, 1948 in New York. On the back of the envelope were the written words: "This is my last will enclosed Cathrin A Fritz my neice is Executor for my estate without Bond See Louis J Euler Attorney of Mine after my Death." At the same time Edward saw the "letter to Cathrin" lying just beneath the will "in this bottom part of a shirt box * * *. It lay separately in the bottom part of the box." The letter was not in any way attached to the brown envelope. Also, he saw some money in the same box. The doctor's testimony differs in no substantial respect from that of Catherine except that she testified that the two writings were attached by a "paper clip."

Persuasive of the truth of Dr. Kilfoy's testimony is the fact that in neither petition of Catherine for probate was a "paper clip" mentioned. The letter was in no way described or designated as a dispositive document. Its only superscription was "for Cathrin Fritz." There is no evidence that decedent ever mentioned to Catherine that he had left the two instruments as his will. In fact, the young woman had never seen the letter in decedent's lifetime. She testified that she and Kilfoy discovered it at the same instant they found the will. While she insists that the letter was clipped to the will, her testimony on that point is weakened by the fact of her long delay in filing the letter for probate after she had filed her petition on the will. Even at that late date she did not present the clip or any other corroborative fact to prove that she had found the two writings attached together.

[4, 5] Appellant's only purpose in belatedly offering the letter must have been to give a date to the will. In that respect it failed of its purpose. To be effective as an integral part of a will a separate document must be dispositive and actually attached to the will, or by its contents disclose that it was intended to supplement the will. Neither condition is a feature of the "letter to Cathrin." Not only were they separate at the time of decedent's passing, but there is not a word in the letter indicating that the testator was bequeathing any property to any person, or was nominating a different executor or attempting to modify the will in any respect. Contrary to appellant's assertion, it is not obvious that the testator's "intention runs in a coherent and consistent continuity all through" both instruments. While the will does in fact "give," and "bequeath" to Catherine personal property, "one-third of my total estate net" and the letter recommends to Catherine that she keeps certain specified securities the two

documents can be integrated with no more propriety than Evangeline and Miles Standish. Notwithstanding their similarities, each is complete as a literary product in itself. Because the will is void for want of a definite date it cannot be vitalized by a letter penned over a year later merely because that letter discourses in part on Catherine's bequests. Where there is no extrinsic evidence of the testator's intention to have his will consist of various pages they will not be so regarded by the courts unless the context indicates such a coherency as to constitute one continuous composition. Cole v. Webb, 220 Ky. 817, 295 S.W. 1035, 1037; Sellards v. Kirby, 82 Kan. 291, 108 P. 73, 28 L.R.A.,N.S., 270, 279. Of course a valid will may be written on several sheets without attaching them so long as their integration is definitely indicated by the thought. But unless the context reasonably shows that they were all written for a single purpose, i. e. to dispose of the author's estate, to name his devisees and to nominate an executor, they must be regarded as distinct instruments.

[6] In re Estate of Sack, 88 Cal.App. 2d 791, 199 P.2d 420, the court was confronted with a similar situation. The will dated June 16, 1931, was a "complete and positive disposition of his entire estate without reservations" and nominated a bank as executor. After that instrument had been filed for probate, the executor filed a letter dated June 25, 1931. It had been found in the safe deposit box with the will but in a separate envelope. It was a letter to his sister, his residuary legatee. "The whole tenor of the letter disclosed an intention to let the will stand as written, the effect of which is a complete devise to Ida without any reservation." The letter was denied probate because it was not dispositive. The rule is that a clear and distinct devise or bequest cannot be affected by any other words not equally clear and distinct. Probate Code, sec. 104; In re Estate of Marti, 132 Cal. 666, 672, 61 P. 964, 64 P. 1071. In Re Estate of Bauer, 51 Cal.App.2d 636, 124 P.2d 630, this court reversed an order admitting three letters, each of which indicated a testamentary intent but only one was dated May 1, 1940. The other three did not exist at the time the dated letter was written. The latter was sufficient as a holographic will. Nothing in the undated letters indicated a desire that they be construed with the letter of May 1. They were properly denied probate.

[7] In the case at bar the will was complete in all respects save its date. It made a positive disposition of his entire estate. It gave Catherine one third of the residue and bequeathed the remaining two thirds to relatives, priests and institutions. He recommended that she take her share in stocks. In his letter he did not intimate the slightest change in his will as written but instead gave only suggestions and advice to his niece. As a will or codicil the letter is defective in that it was not written as a testamentary instrument. If he did not intend that it should dispose of his property, it was ineffective for any purpose in transmitting his estate. In re Estate of Major, 89 Cal.App. 238, 241, 264 P. 542. By no words at all and by no reasonable construction can it be said that the will was incorporated into the letter.

Was there an integration of the will and the letter? If the letter did not incorporate the will by reference, it cannot be read with the will unless by virtue of the application of the doctrine of integration. The earliest use of the principle without naming it was in Estate of Skerrett, 67 Cal. 585, 8 P. 181. There a deed and a letter with a copy of the deed of the testator were offered in separate proceedings for probate. On appeal it was held that the undated letter indicated a purpose to devise and since the deed alone was not holographic and therefore not a will, for the reasons discussed, the two documents were admitted as a will. In Re Estate of Taylor, 126 Cal. 97, 58 P. 454, the court found that the writing offered as a will consisted of two sheets of paper and that the second was written three months after the first, but that they constituted one continuous instrument, a single document, a valid will. Parol evidence served to establish that the testatrix had written both papers and inclosed them in an envelope replaced in her trunk. In the Estate of Merryfield, 167 Cal. 729, 141 P. 259, the doctrine of integration was felicitously applied because each of the three sheets of paper used by the testatrix provided for a disposition of her estate. They had been folded together in proper sequence and placed in a locked drawer by decedent. Each contained only her handwriting. All three were of the same size, the same paper torn from the same pad. On sheet one she gave all her property to her girls. On sheet two she wrote "the boys have got more than the girls and they won't get any more." On sheet three she wrote "this is my will * * * I want my girls * * * to have all my belongings, my house and lot and the things in the house." It was held immaterial that the will was written upon more than one sheet of paper; it was not necessary that they should be mechanically fastened together.

[8] The word "integration" as applied to the principle was first used in Re Estate of Wunderle, 30 Cal.2d 274, 181 P.2d 874. "In the law of wills, integration, as distinguished from incorporation by reference, occurs when there is no reference to a distinctly extraneous document, but it is clear that two or more separate writings are intended by the testator to be his will. * * * Thus several writings, connected by sequence of thought * * * folded together * * * or physically forming one document * * * have been admitted to probate as constituting an holographic will." 30 Cal.2d at page 281, 181 P.2d at page 878. But while two or more separate writings may constitute one will when they bear either mechanical evidences of the testator's intention or internal proof that the author intended both to be one, yet it is an equally well established rule that the absence of a date or of a testamentary intent in one document cannot be supplied by another totally disconnected instrument. (Ibid.) In Re Estate of Swendsen, 43 Cal.App.2d 551, 555, 111 P.2d 408, the holographic will was written on two separate pieces of paper but only one was dated. They were not attached or in any way connected, but witnesses proved the declaration of decedent to have been that the two sheets constituted his last will. However, where two sheets of paper are neither fastened together, nor found in one envelope and their unity is not proved by parol proof, the omission of a complete date from the testamentary instrument will not be supplied by the date in another letter written on the same day but not of testamentary character. In re Estate of Anthony, 21 Cal.App. 157, 162, 131 P. 96. In the instant matter no witness testified that decedent declared the two documents to be one will. Therefore, since decedent's letter to Catherine was in no way attached to the will, the coherency of thought of the two instruments is the only theory whereby their unity may be established.

A comparison of the two writings instantly reveals no continuity of the will to the letter. The will is a dispositive document, designates the objects of the testator's bounty, contemplates an approaching dissolution and names an executrix of his will. The letter discloses nothing paramount to his affection for Catherine and his anxiety that she be not imposed upon by an avaricious suitor. It offers to give nothing to any one. It proposes not the slightest change in the terms of the will. Its prime objective was to express his concern for her welfare and his gratitude for her kindness, to advise her as to her behavior and to commend certain securities. Since it contains no language indicative of a testamentary intent, it cannot be construed as a will. In re Estate of Major, 89 Cal.App. 238, 242, 264 P. 542. That he was not ignorant of the phraseology of a will is evidenced by the 1946 document Then he gave his effort a caption: "Last Will and Testament of John H. Fritz." He enclosed it in an envelope on which he inscribed: "This is my last will." After declaring his competency, he directs that his debts lawfully incurred be paid. In 18 separate paragraphs he bequeaths specific sums to as many legatees, gives Catherine one third of the residue and then appoints her as trustee of specified funds for certain purposes and nominates her as executrix without bond and in the alternative, Louis J. Euler, "as attorney and executor to settle estate." The composition and language of the document reveal such an intimate knowledge of the elements of a will that the trial judge could hardly have avoided finding that in writing the letter he had no thought that thereby he would transfer property or name an executrix. A similar situation was before the courts some 35 years ago. A will with all formalities had been written by the decedent. Nine months later he wrote a letter to his brother in which he discussed his own properties, a possible sale, a purchase, a request for a loan, and incidentally mentioned that if the brother did not make the loan, still the properties would go to him and Charley "if I should pass in before youss do." The court held that it was a fair inference from all the evidence that the testator fully understood the character of the document that he should execute as a will, but that the letter does not disclose any purpose or intent to dispose of his estate. His remarks were casual, not testamentary. In re Estate of Branick, 172 Cal. 482, 484, § 157 p. 238.

[9] Now, if the letter to Catherine did not incorporate the will by reference, and it did not; if it did not dispose of property, In re Estate of Cook, 173 Cal. 465, 468, 160 P. 553, or appoint an executor or name a guardian (Page on Wills, Limited Edition, Vol. I, p. 103), and it did neither; if it was not intended to be integrated with the will, and we have shown that it could not have been; if it merely expressed desires of the decedent, as it discloses, In re Estate of Goldthwaite, 140 Cal.App. 551, 35 P.2d 1050, then the trial court properly rejected it as a testamentary instrument.

Appellant has cited numerous authorities, In re Estate of Spitzer, 196 Cal. 301, 237 P. 739; Clarke v. Ransom, 50 Cal. 595; In re Estate of Johnston, 64 Cal.App. 197, 221 P. 382; In re Estate of Miller, 128 Cal. App. 176, 17 P.2d 181; Bond v. Seawell, 97 Eng.Reps. 1092; In re Estate of Dexter, 179 Cal. 247, 176 P. 168; In re Hickman's Estate, 101 Cal. 609, 36 P. 118; In re Estate of Tooley, 170 Cal. 164, 149 P. 574; In re Estate of Wood, 36 Cal. 75, 80; In re Estate of Mitchell, 160 Cal. 618, 117 P. 774; In re Estate of Hull, 77 Cal.App. 792, 247 P. 1093, and others, in addition to those discussed herein. In none of them is language to be found that would warrant reversal of a judgment denying probate of a letter based upon findings that it was not intended as a last will and that decedent did not intend it to be integrated with his will, written twelve months previously, where such findings are supported by substantial evidence.

[10] The final argument presented by appellant is that the Supreme Court's early interpretations of section 53 of the Probate Code, In re Estate of Martin, 58 Cal. 530, etc., are outmoded, "backward," "harsh and uncompromising" and should be brought "abreast with humanitarian progress of modern law." She contends that "December 1946" is such a reasonable compliance with the statute that the intention of the testator is frustrated by a holding that such date invalidates the will. She cites numerous California decisions, In re Estate of Chevallier, 159 Cal. 161, 113 P. 130; In re Estate of Lakemeyer, 135 Cal. 28, 66 P. 961; In re Estate of Durlewanger, 41 Cal.App.2d 750, 752, 107 P.2d 477; In re Estate of Wilkinson, 113 Cal.App. 645, 298 P. 1037; In re Estate of Fay, 145 Cal. 82, 78 P. 340; In re Estate of Akeley, 35 Cal.2d 26, 215 P.2d 921, wherein the rule was interpreted and some cases from other jurisdictions, Bailey v. Teackle, 1793, Wythe, Va., 173; In re Hail's Estate, 106 Okl. 124, 235 P. 916; In re Estate of Irvine, 114 Mont. 577, 139 P.2d 489, which support her contention. The answer to such arguments is: (1) The statute[1] says it must be entirely dated by the holographic author; (2) the Supreme Court has held for 70 years that compliance with the requirements of this section "is essential to the validity of a document as an olographic will, viz. that it be *entirely* written, dated, and signed by the hand of the testator himself", In re Estate of Thorn, 183 Cal. 512, 514, 192 P. 19, 20; Estate of Billings, 64 Cal. 427, 1 P. 701; (3) if the Legislature had been displeased with such interpreta-

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[1] Probate Code, section 53.

tion it would have modified the statute; (4) if it is not a rational interpretation the Supreme Court will reverse its former holdings; (5) an excess of virtue in the decision of an outside jurisdiction does not cause it to prevail over the settled judicial policy of this state; (6) to transmit one's property by will does not arise from a congenital right but is a privilege granted by the state; and in enacting regulatory rules governing the forms of wills as well as the order of succession the legislature may fix certain arbitrary requirements.

Judgment affirmed.

McCOMB, and WILSON, JJ., concur.

Hearing denied; CARTER, TRAYNOR, and SCHAUER, JJ., dissenting.

102 Cal.App.2d 440

McNEIL v. GARCIA.

Civ. 7835.

District Court of Appeal, Third District, California.

Feb. 20. 1951.

Action by Hazel McNeil against Tony Garcia, for dissolution of partnership and for an accounting. The Superior Court, Merced County, R. R. Sischo, J., rendered judgment, and the plaintiff appealed. The District Court of Appeal, Peek, J., held that the evidence warranted the trial court's finding that the plaintiff's share of the profits of the business was $6,485.81, of which the plaintiff had already withdrawn $5,646.47.

Judgment affirmed.

1. Evidence 🔑595

An inference which might be drawn from a given finding cannot be allowed to stand as against a specific finding to the contrary of the inference.

2. Appeal and error 🔑1071(1)

Immaterial conflicts in findings will be disregarded where the judgment is supported by other findings abundantly sustained by the evidence.

3. Appeal and error 🔑1010(1)

A finding of fact which is supported by substantial evidence will not be disturbed on appeal.

4. Partnership 🔑121

In action for partnership dissolution and for accounting, evidence warranted trial court's finding that plaintiff's share of profits of business was $6,485.81, of which plaintiff had already withdrawn $5,646.47.

H. E. Gleason, Turlock, for appellant.

Landram & Silveira, Merced, for respondent.

PEEK, Justice.

This is an appeal by plaintiff from a judgment arising out of an action for dissolution of a partnership between plaintiff and defendant, and for an accounting.

In April 1947 plaintiff and defendant entered into a partnership to operate a tavern in the city of Merced. Differences arose over financial matters and in October 1947, plaintiff instituted this action. The business was placed in the hands of a receiver, who operated it until January 16, 1948, when upon the stipulation of the parties the court discharged the receiver and turned the operation of the business over to defendant. Defendant continued to operate the business under the supervision of the court until April 18, 1948, when by another stipulation of the parties the partnership was dissolved and a referee was appointed to make an accounting. Three days thereafter defendant purchased plaintiff's share of the business. Plaintiff filed objections to the report of the referee and the cause proceeded to trial. The court, basing its findings on the report of the referee, concluded that plaintiff's share of the profits of the business was $6,485.81, of which plaintiff had already withdrawn $5,646.47, and entered judgment accordingly.

Plaintiff's contention on appeal is that the court's finding as to the net profits of the business is incorrect; that a substantial portion of the proceeds from sales of merchandise was not reported in the books of the firm, and that the finding that large sums were appropriated by Garcia supports her contention that the referee's report does not truly reflect the financial condition of the business.

[1-4] It is the settled law in this state that an inference which might be drawn from a given finding cannot be allowed to stand as against a specific finding to the contrary of the inference. Jacks v. Deering, 150 Cal. 272, 275, 88 P. 909. Furthermore, immaterial conflicts in the findings will be disregarded where the judgment is supported by other findings abundantly sustained by the evidence. Epstein v. Gradowitz, 76 Cal.App. 29, 31, 243 P. 877. The judgment finds further support in that a finding of fact, if it is supported by substantial evidence, will not be disturbed on appeal, Tupman v. Haberkern, 208 Cal. 256, 280 P. 970, and since in the present case there is substantial evidence to support the findings of the trial court, the judgment must be affirmed.

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

102 Cal.App.2d 382

HULL v. HULL et al.

Civ. 17988.

District Court of Appeal, Second District,
Division 2, California.

Feb. 19, 1951.

As Modified Feb. 23, 1951.

Marion Audrey Hull brought action against Foster Miller Hull for divorce, wherein plaintiff secured an interlocutory decree. After death of the defendant, Alice E. Hull filed a motion for entry of a final decree, nunc pro tunc as of May 1, 1942. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered a final decree, nunc pro tunc as of May 1, 1942, pursuant to the motion, and the plaintiff appealed. The District Court of Appeal, Moore, P. J., held that where wife secured interlocutory divorce decree on April 29, 1941, and thereafter husband entered into marriage with another on November 15, 1946, without ascertaining that final decree had not been issued, and deceased on September 8, 1949, there was a sufficient showing of mistake, inadvertence or negligence to justify entry of final decree, nunc pro tunc as of May 1, 1942, upon application of one who subsequently celebrated marriage ceremony with husband.

Affirmed.

Divorce ⚷162

Where wife secured interlocutory divorce decree on April 29, 1941, and thereafter husband entered into marriage with another on November 15, 1946, without ascertaining that final decree had not been issued, and husband died on December 8, 1949, there was a sufficient showing of mistake, inadvertence or negligence to justify entry of final decree, nunc pro tunc, as of May 1, 1942, upon application of one who subsequently celebrated marriage ceremony with husband. Civ. Code, § 133; Code Civ. Proc. § 1963, subds. 1, 4, 20, 28.

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Henry C. Huntington, of Los Angeles, for appellant.

Randles & Randles, Los Angeles, for respondent Alice E. Hull.

Le Roy Anderson, of Arcadia, for respondent Foster Miller Hull.

MOORE, Presiding Justice.

Appellant filed for divorce January 10, 1940, and her interlocutory decree was entered April 29, 1941. By the affidavits of Alice Hull, respondent, and Henrietta Jourdin it appears that Foster Hull celebrated a marriage ceremony with Alice on November 15, 1946, and that he deceased on September 8, 1949, leaving his estate to her; that she had no knowledge of the fact that a final decree had not been entered prior to her marriage ceremony. On March 1, 1950, Alice moved the court to enter a final decree, *nunc pro tunc* as of May 1, 1942. The record discloses (1) the minute order of March 30, 1950, which recites that "after oral arguments and on the court's own motion, the final decree of divorce is ordered entered *nunc pro tunc* as of May 1, 1942," and (2) the ensuing judgment of divorce followed by Judge Maltby's order that "this judgment be dated, signed, filed, and entered *nunc pro tunc* as of May 1, 1942."

The appeal is from "the judgment entered March 27, 1950, *nunc pro tunc* as of May 1, 1942, and from the order entering said decree and the whole thereof."

Appellant demands a reversal on the grounds that (1) the court was without jurisdiction to hear and determine the motion of respondent, and (2) the court erred in granting it in view of respondent's failure to aver any evidence of mistake, inadvertence or negligence as required by section 133 of the Civil Code.[1] The only inadvertence or negligence expressly set forth in the affidavit is respondent's failure to ascertain prior to her marriage to decedent that a final decree had not been issued. She avers that after Foster's death she "discovered for the first time that no final decree of divorce had been filed." These facts alone show negligence and inadvertence on the part of both respondent and deceased within the meaning of the cited statute. The mere fact that one has entered into a second marriage while not wholly free from prior matrimonial bonds when such freedom could have been procured by no effort more than the filing of the necessary affidavit, certainly demonstrates in itself that a mistake was made or that there was negligence or inadvertence on the part of someone. The suggestion of appellant that the decedent might have intentionally refrained from causing the final decree to be entered is overcome by the presumption "That a person is innocent of crime or wrong." Code Civ. Proc., 1963, subd. 1.

Moreover, there are implied in the language of the affidavit three facts as clear as if they had been expressly declared, namely, (1) appellant was the party to whom the interlocutory was awarded, (2) decedent had assumed that as the aggressor in the action appellant would have caused the entry of the final decree, (3) presumptions that operated on the mind of decedent, to wit, (a) that a person takes ordinary care of his own concerns, (b) the ordinary course of business has been followed, (c) things have happened according to the ordinary course of nature and the ordinary habits of life. Code Civ. Proc. sec. 1963, subds. 4, 20, 28. By reason of such facts and presumptions the court below was warranted in determining that respondent had shown negligence and inadvertence in contracting a marriage with Foster Hull without first learning the status of the divorce record as well as negligence and inadvertence on the part of decedent. When any person sets about to achieve a serious purpose which is not beyond his powers, after he has proceeded to the threshhold of his goal it is a fair presumption subsequently that he has taken "ordinary care of his own concerns." Especially is such presumption applicable where the final step to a realization of such purpose involves no expense. The showing of inadvertence was sufficient to justify the order. A judge of the superior court is in the position of the chancellor of olden times whose constant aim was to preserve the tranquility of society and the happiness of the individual where it could be done without detriment to anyone.

Appellant had received her interlocutory decree five and a half years before her estranged husband was wed to respondent. Through purpose or inadvertence appellant omitted to cause a final decree to be entered. If it was because of her mistake, negligence or inadvertence she can have no grievance against respondent who justifiably presumed that appellant had accomplished her incipient purpose.

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[1] "Whenever either of the parties in a divorce action is, under the law, entitled to a final judgment, but by mistake, negligence or inadvertence the same has not been signed, filed or entered, * * * the court * * * upon its own motion, may cause a final judgment to be signed, dated, filed and entered therein granting the divorce as of the date when the same could have been given or made by the court if applied for. * * * Upon the filing of such final judgment, the parties to such action shall be deemed to have been restored to the status of single persons as of the date affixed to such judgment, and any marriage of either * * * subsequent to one year after the granting of the interlocutory judgment * * * and after the final judgment could have been entered under the law if applied for, shall be valid for all purposes as of the date affixed to such final judgment, upon the filing thereof."

Affirmed.

McCOMB and WILSON, JJ., concur.

GORDON v. ROMBOTIS et al.*

Civ. 18186.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1951.

Rehearing Denied March 5, 1951.

Hearing Granted April 19, 1951.

Samuel J. Gordon brought action against Robert L. Rombotis and others to quiet title to realty, and Elbert, Ltd., a corporation, filed a cross-complaint. The Superior Court of Los Angeles County, Roger Alton Pfaff, Judge of the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, presiding as judge of the Superior Court under designation of the Chief Justice, as Chairman of the Judicial Council, rendered a judgment adverse to Elbert, Ltd., a corporation, and it appealed. The District Court of Appeal, Moore, P. J., held that statute of limitation limiting time within which to bring action to enforce lien on sewer bond against realty was not tolled during period that tax title to realty was in the state under a tax deed.

Affirmed.

Limitation of actions 🔑104½

Statute of limitations limiting time within which to bring action to enforce lien of street improvement bond against realty was not tolled during time that title to realty was in the state under tax deed. Civ.Code, § 2911; Streets and Highways Code, §§ 6446, 6460.

John F. Bender and Gizella M. Allen, Los Angeles, for Elbert, Ltd.

Chas. I. Rosin, Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether section 2911 of the Civil Code is valid in that it provides that a bond issued to represent an assessment for a public improvement is conclusively presumed to have been extinguished at the expiration of four years after the due date of such bond or of the last principal coupon.[1]

Respondent sued to quiet title to a specified lot 9 alleging that he was a purchaser thereof in good faith from the state at public sale April 1, 1949, for default in the payment of city taxes for the fiscal year

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[1] Section 2911, Civil Code. "A lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, either:

"1. An action can be brought upon the principal obligation, or

"2. A treasurer, street superintendent or other public official may sell any real property to satisfy a public improvement assessment or any bond issued to represent such assessment and which assessment is secured by a lien upon said real property; whichever is later.

"Anything to the contrary notwithstanding, any lien heretofore existing or which may hereafter exist upon real property to secure the payment of a public improvement assessment shall be presumed to have been extinguished at the expiration of four years after the due date of such assessment or the last installment thereof, or four years after the date the lien attaches, or on January 1, 1947, whichever is later, or in the event bonds were or shall be issued to represent such assessment, the lien shall then be presumed to have been extinguished at the expiration of four years after the due date of said bonds or of the last installment thereof or of the last principal coupon attached thereto, or on January 1, 1947, whichever is later. The presumptions mentioned in this paragraph shall be conclusive in favor of a bona fide purchaser for value of said property after such dates."

* Subsequent opinion 238 P.2d 992.

1932–1933 and subsequent years. Rombotis filed a disclaimer. Appellant, Elbert, Ltd., answered that it is owner of Bond 84, County Improvement No. 758, issued by the Treasurer of Los Angeles County, March 5, 1931, for sewering Geraghty street "and that there is due and unpaid thereon all principal and interest installments from July 2, 1933," plus unpaid interest and penalties on such unpaid amounts. Also, it denied that such purchase was in good faith and for a valuable consideration.

The court found that appellant owns bond 84 and that nothing has been paid on account thereof from July 2, 1933; that respondent purchased the lot in good faith and for a valuable consideration; is the holder of a tax title, represented by a tax deed issued April 1, 1949, by the Tax Collector to respondent; that bond 84 was issued March 5, 1931, provided for payment of principal and interest in ten equal installments, the last of which became due and payable January 2, 1941; that by reason of the law and by virtue of the provisions of section 2911 of the Civil Code the lien theretofore existing by virtue of bond 84 has expired, is not effective for any purpose and respondent acquired lot 9 free of any lien subsisting by virtue of bond 84 The judgment quieted title in respondent.

Appellant now demands a reversal of the judgment on the following grounds: 1. The lien of the unpaid taxes which merged into the State's title was on a parity with the lien of bond 84. 2. During the State's ownership appellant was barred from commencing an action for partition by constitutional prohibitions. 3. Under the facts of this case either the conclusive presumption provision of section 2911 is violative of the due process clause of the federal constitution or a tax deed buyer is not a bona fide purchaser for value.

In support of its thesis appellant divides its argument under nine propositions and cites a number of pertinent authorities designed to show that (1) respondent's lien is limited to the amount paid for the tax deed, citing Monheit v. Cigna, 28 Cal.2d 19, 168 P.2d 965, 167 A.L.R. 995; Elbert v. Nolan, 32 Cal.2d 610, 197 P.2d 537; Munden v. Hayes, 89 Cal.App.2d 772, 202 P.2d 112; (2) the lien of bond 84 persists despite the sale to the state and in spite of the provisions of section 2911 of the Civil Code; (3) the statute of limitations, sec. 2911, Civ.Code, should be tolled; (4) its lien is the amount due on bond 84; (5) the fact that bond 84 was not paid in view of sections 6460 and 6446 of Streets and Highways Code overcomes the presumption that the lien of the bond was extinguished. Such contentions are vain in the light of Rombotis v. Fink, 89 Cal.App.2d 378, 201 P.2d 588, a hearing of which was denied by the Supreme Court in February, 1949.

The facts there involved are an exact parallel of those now under review and the contentions made by the parties are almost identical with those made here. The trial court there found that the street improvement bond was valid and subsisting; the statute of limitations was tolled while the property was owned by the state; the defendant was entitled to a court foreclosure of the bond. On appeal the judgment was reversed with the observations that (1) the provisions of the Civil Code, section 2911, do not impair the obligations of a contract; (2) the several applicable enactments reflect a clear purpose to provide a definite period of limitations as to all liens arising under special assessments upon the expiration of which period street improvement liens would be unenforceable and presumptively extinguished; (3) laws may provide that a person who has been afforded a reasonable opportunity to protect his rights and failed to take advantage thereof may be barred from asserting such rights; (4) the establishment of statutes of limitation is always a legislative prerogative; (5) there is urgent need for certainty, finality and security of titles; (6) a bona fide purchaser is one who takes in good faith and for value and in reliance upon the presumptions afforded by section 2911, supra. Thereupon, the judgment was reversed with the holding that sections 330 and 2911 of the Civil Code as amended in 1945 are constitutionally applicable to assessment bonds in existence prior to the effective date of the legislation and that the plaintiff was entitled to have his title quieted against the defendant, holder of the bond.

The authorities cited by appellant are of no avail. They were announced prior to the effective date of section 2911 and therefore antedate Rombotis v. Fink, supra.

Judgment affirmed.

McCOMB, J., concurs.

102 Cal.App.2d 374

VALLELUNGA v. GOMES et al.

Civ. 14451.

District Court of Appeal, First District,
Division 1, California.

Feb. 19, 1951.

In an action by Lora Gomes against the estate of her deceased, divorced husband a judgment was entered requiring the executrix of the husband's estate to pay $2,280.00 into court to be paid over to Emma in monthly installments of $10 until such amount should be paid in full, subject, however, to abatement upon the remarriage of Emma. After the death of Emma Gomes, Lora Gomes, executrix of the last will and testament of Alfred Gomes, also known as Al Gomes, and as Alfred Harry Gomes, deceased, moved for an order directing the payment to the estate of the residue of the deposit. The Superior Court, Santa Clara County, Byrl R. Salsman, J., denied the motion, and the movant appealed. The District Court of Appeal, Fred B. Wood, J., held that the unpaid balance of the funds should go to Emma's grantees, legatees, or heirs, since the entire fund had belonged to Emma subject to defeasance only if she should marry prior to its exhaustion and since there could be no defeasance after her death.

Affirmed.

1. Executors and administrators 🔑255

Where judgment against estate of deceased husband stated that sum of $2,280.00 was due and payable to divorced wife of decedent at rate of $10 per month until paid in full subject to abatement upon marriage of said ex-wife, and required that executrix should pay sum into court to be paid over to ex-wife in said monthly installments until full sum had been paid unless abated, there could be no defeasance after death of ex-wife without remarrying, and unpaid balance of sum unpaid at her death would go to ex-wife's grantees, legatees, or heirs.

2. Judgment 🔑297

Whether judgment against estate of deceased husband providing that his divorced wife should receive $2,280 at rate of $10 per month subject to abatement upon her remarriage was proper was question for consideration upon direct appeal and not for consideration by way of motion in original action after final judgment.

3. Deposits in court 🔑11

When court takes custody of fund it assumes authority and responsibility over that fund which it does not necessarily lose upon entry of judgment or dismissal of action. Code Civ.Proc. §§ 572–574.

4. Deposits in court 🔑10, 11

A court of equity has duty of administering funds held in custody of law, distributing them to such parties as, after due hearing, show themselves entitled thereto, and such duty continues even after dismissal of action in which court gained custody, and this power of a court of equity includes power to order restitution of deposit that is withdrawn without authority, which last power may be exercised in suit after final judgment. Code Civ. Proc. §§ 572–574.

5. Judgment 🔑297

Court of equity has inherent power to supervise execution of its orders, even after they have become final, and may modify them in ways affecting only details of their performance.

6. Deposits in court 🔑12

Where judgment against estate of deceased husband required executrix to pay $2,280.00 into court to be paid to decedent's ex-wife at rate of $10 per month until full sum had been paid, unless abated by remarriage of ex-wife, and subsequently ex-wife died without marrying, leaving residue of award unpaid, court which entered judgment had jurisdiction to dispose of residue upon motion made in original action after final judgment. Code Civ. Proc. §§ 572–574.

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Kirby, Pasquinelli & O'Connor and Edward M. Fellows, Timothy A. O'Connor, all of San Jose, for appellant.

John H. Machado, San Jose, for respondent.

FRED B. WOOD, Justice.

Defendant, Executrix of the Will and Estate of Alfred Gomes, appeals from an order denying her motion of October 17, 1949, for an order directing the payment to said estate of the residue of a deposit that had been made with the court pursuant to the judgment that had been rendered in the action on November 30, 1945, a judgment which had become final.

The action was brought May 12, 1945, by Emma Gomes against the executrix of the estate of Alfred Gomes (Emma's deceased, divorced husband) to establish her claim against the estate for money due and yet to become due for support of certain of their children and for money payable to Emma for raising and caring for the children, a claim predicated in part upon the provisions of a final decree of divorce between Emma and Alfred, entered May 14, 1941, and in part upon the provisions of a support and property settlement agreement made by them on the 24th of January, 1940.

The judgment rendered herein on November 30, 1945, decreed, in part, that Emma Gomes then had a "valid and existing claim in the amount of $4,277.85 against" said estate "and the same is allowed for said amount,"[1] and that *"the sum of $2,280.00 of said claim is due and payable* out of the assets of said estate * * * to plaintiff [Emma Gomes] at the rate of $10.00 per month commencing October 31, 1947, or from the date of marriage of said Alfred Gomes [Jr.] if he marries prior to October 31, 1947, *until said amount is paid in full, subject, however, to abatement upon the marriage of plaintiff* herein. It is ordered and decreed that the said executrix * * * be directed to pay into the above-entitled court said amount out of the assets of said estate * * *, *such sum to be paid over to plaintiff* in said monthly installments of $10.00 per month and at such times as said installments accrue *until the full sum of $2,280.00 has been paid unless abated as herein set forth.*" (Emphasis added.)

On January 28, 1946, the money was paid into court pursuant to the judgment. In due course the monthly $10 payments to Emma Gomes commenced. They continued to be made until her death on May 9, 1949, when a balance of $2,110 remained in the fund. This unpaid balance, appellant claims, reverted to the estate of Alfred. It does not expressly appear in the record before us that Emma did or did not marry subsequent to rendition of the judgment. From the fact that the monthly installments were paid her until her death, it is inferable that she did not marry. However, that is not an issue presented by appellant, either upon her motion in the superior court or upon this appeal. Her claim is predicated solely upon the theory that the judgment gave Emma but a life estate or interest in the fund, thereby creating in the estate (which provided the fund) a reversionary interest that became a present right of title to and enjoyment of the balance of the fund remaining undue and unpaid at the time of Emma's death.

[1] We do not so interpret the judgment. It says that $2,280 of Emma's claim against the estate "is due and payable" to Emma; that it is payable "at the rate" of $10 per month "until said amount is paid in full," subject to abatement "upon the

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[1] The $4,277.85 included the following items: (1) $1,532.85 overdue and unpaid for support of the children, as of the commencement of the trial herein, (2) $465 for support of the one remaining unmarried minor child (Alfred, Jr.) from the date of trial until that child's twenty-first birthday, and (3) $2,280 payable to Emma as provided in the above excerpt from the judgment.

marriage" of Emma; and that the executrix shall pay that amount ($2,280) into court, "such sum to be paid over" to Emma "in said monthly installments * * * until the full sum of $2,280.00 has been paid in full" unless "abated as herein set forth."

By these words the court expressed, as clearly and unmistakably as available words permit, the concept that the entire fund belonged to Emma, enjoyable by her in monthly installments, subject to defeasance only if she should marry prior to exhaustion of the fund. From and after her death there can be no defeasance, for the event which would bring about a defeasance no longer can occur. Necessarily, the unpaid balance of the fund goes to Emma's grantees, legatees, or heirs.

Appellant urges that this judgment should be read in the light of the issues framed by the pleadings in the action, and the facts found by the court after trial of those issues. Such an inquiry, says the appellant, will demonstrate that the judgment was intended to declare and enforce certain provisions of a property settlement agreement made by Emma and the decedent Alfred prior to their divorce; that those provisions, manifestly, obligated him to pay her $10 per month from and after the maturity or marriage of all of three of their minor children until Emma's death or remarriage. Therefore, appellant would conclude, it was the reasonable intendment of the judgment, in creating a fund for such monthly payments, that the fund abate upon Emma's death or remarriage.

Respondent contends that no such inquiry is in order because the language of the judgment is so clear and unambiguous it admits of no such aid to interpretation. That is probably true. It happens, however, that the suggested inquiry supports the plain wording, the clear meaning, of the judgment, and demonstrates that the judge who signed and filed the judgment meant what he said.

The property settlement agreement, as pleaded in the complaint and found by the court, after making an allocation of property and providing for care and custody of three of their children by Emma and payments to her therefor by Alfred, declared that upon all three children attaining 21 or marrying, "then from that time on first party [Alfred] shall pay to second party [Emma], only if second party is still single at that time, the sum of $10.00 per month so long as second party remains single, but if she remarries said payments shall terminate," and that "It is understood that said monthly sum [$10 per month] is not deemed to be alimony, but that the same is being paid to second party [Emma] in consideration of her raising and caring for said minor children."

The agreement doubtless did contemplate cessation of the $10 monthly payments to Emma in the event of her death or remarriage.

But the judgment did not so provide. Emma's amended complaint, in respect to this part of her claim, alleged that she had a life expectancy of 19 years and that a sum of money representing $10 per month over a 19-year period had become and was due and owing to her. She prayed for a money judgment in an amount which included that sum, and for such other and further relief as might be equitable in the premises. Alfred's executrix, in her answer, denied these allegations and alleged that upon Alfred's death his obligation to make payments under the agreement terminated, save as to those which had already accrued and remained unpaid.

Upon these issues the trial court found that "the life expectancy of plaintiff from October 31, 1947, is a period of nineteen (19) years," and that "there is due and payable to plaintiff out of the estate of said deceased the sum of $2,280.00" ($10 per month for 228 months, 19 years), "payable to plaintiff from October 31, 1947, or from the date of marriage of said Alfred Gomes [Jr.] prior to October 31, 1947, at the rate of $10.00 per month, subject, however, to abatement upon the marriage of plaintiff." From these findings the court drew the conclusion of law that plaintiff was entitled to judgment for $2,280 as provided in that portion of the judgment quoted early in this opinion.

It is apparent that in this portion of the findings, conclusions of law, and judgment, the court was not following the precise terms of the property settlement agreement. It was modifying them by liquidating the amount payable to Emma.

Under the agreement (assuming it did not terminate, as to future payments, upon the death of Alfred, Sr.; the court found it did not) Emma stood to receive more than $2,280 if she outlived her 19 years' expectancy. If she died sooner, she would receive less. Liquidation of this amount and a present award of it to Emma would avoid keeping the estate open for an indefinite period to make monthly payments. An immediate lump sum payment of $2,280 was impracticable because of the possibility of Emma's remarriage. The impounding of the money, coupled with the provision for monthly payments subject to abatement upon Emma's remarriage, furnished a practical solution to that problem. That, it would seem, is what the court intended, writing its judgment in words appropriate to the carrying out of that intent.

[2] Whether that method of meeting the situation was legally proper in every respect would be a question for consideration upon direct attack, as upon an appeal from the judgment, not in the instant proceeding, the judgment having become final. The fact that the defendant, executrix of the will and estate of Alfred, Sr., took no appeal is some indication that the practical solution worked out by the court was at the time agreeable and acceptable to all parties in interest.

An additional point is urged by respondent. She suggests that appellant should have presented the issues here involved by way of a new and independent action, not by way of a motion in the original action after final judgment.

[3, 4] We do not deem this point well taken. The motion presented a question of interpretation, not modification, of the judgment, and, if a certain interpretation were made, distribution of the residue of a fund in the custody of the court. When a court takes custody of a fund it assumes authority and responsibility over that fund which it does not necessarily lose upon entry of judgment or dismissal of the action. The applicable statute declares that, under the circumstances which it describes, a court may order money, or other thing capable of delivery, "deposited in court * * * upon such conditions as may be just, subject to the further direction of the court." Code Civ.Proc. § 572. In such a case the money is delivered to the clerk who must, unless otherwise directed by law, deposit it with the county treasurer, to be held by him "subject to the order of the court." Code Civ.Proc. § 573. If the order for deposit is disobeyed, "the court, beside punishing the disobedience, may make an order requiring the sheriff, constable, or marshal to take the money, or thing, and deposit or deliver it in conformity with the direction of the court." Code Civ.Proc. § 574. This does not suggest that the court may make but a first and final order concerning a deposit. It suggests, instead, a continuing jurisdiction over the deposit throughout the period of the court's custody. In construing the predecessor statute, Code Civ.Proc., § 2104, Code Amends. 1873–4, p. 394, the appellate court in Higgins v. Keyes, 5 Cal.App. 482, 90 P. 972, said that while the county treasurer holds the corpus of the fund, "he does so merely as custodian for the court, and cannot be compelled to pay the money to anyone except on the order of the court holding the deposit. Until such an order has been made, there is no duty imposed upon either the clerk or treasurer to pay out the money." 5 Cal.App. at page 485, 90 P. at page 973. The statute, clearly, is consonant with the principle, enunciated in Re Shyvers, D.C.Cal., S.D., 33 F.Supp. 643, that a court of equity has the duty of administering funds held in the custody of the law, distributing them to such of the parties as, after due hearing, show themselves entitled thereto, a duty which continues even after dismissal of the action in which the court gained custody. Concerning money received in custody by a court (as evidence in a pending action), it was said in Union Bank & Trust Co. v. Los Angeles County, 2 Cal.App.2d 600, 38 P.2d 442, "The court alone had power to order disposition of the money after the purpose of such legal custody had been accomplished." 2 Cal.App.2d at page 610,

38 P.2d at page 446. This power of a court of equity includes the power to order restitution of a deposit that is withdrawn without authority, and may be exercised in the suit after final judgment. This principle we find well expressed in Agricultural Bond & Credit Corporation v. Courtenay Farmers Co-op Ass'n, 66 N.D. 122, 262 N.W. 453, in these words: "The power of the court over moneys in its custody *continues until they are distributed* pursuant to final decrees in the cases in which the moneys are paid, and if from any cause such moneys are previously withdrawn without authority of law, the court can, by summary proceedings, compel their restitution. Until a decree of distribution is made and enforced, the summary power of the court to compel restitution remains intact. *Moneys paid into court to the credit of a suit in equity in the same court are to be disposed of in that suit,* and *no orders* relating to such moneys *can properly be made in another suit which does not include the same parties as the former suit.*" 262 N.W. at pages 457–458; emphasis added.

The four cases last mentioned were cited with approval by our Supreme Court in support of its statement that after dismissal of an action during the pendency of which a court has taken custody of a deposit, that court "has the power to determine the disposition of funds held in *custodia legis* after notice to all parties interested." Lord v. Superior Court, 27 Cal. 2d 855, 858, 168 P.2d 14, 15. Examination of the record in the Lord case shows that the petitioner for the writ of prohibition which the Supreme Court denied sought to restrain the superior court from considering and acting upon a motion for distribution of the funds on deposit, a motion made in the dismissed action after the order dismissing the action had become final. The petitioner claimed that the superior court had no jurisdiction to entertain such a motion in the original action after its dismissal. The statement which we have quoted is significant, and persuasive of the principle announced, even though it also appeared that the superior court when ordering the deposit expressly reserved a continuing jurisdiction over all moneys in the fund.

An equally significant statement appears in Market Street Railway Co. v. Railroad Commission, 28 Cal.2d 363, 171 P.2d 875, a proceeding to review an order of the Railroad Commission reducing street railway fares. Early in the proceeding the court stayed execution of the commission's order and directed the utility to maintain a deposit in court as security for certain purposes, including the amount of the excess of the old over the new fare collected during the pendency of the proceeding. On July 3, 1944, the court rendered its decision affirming the order of the commission. Market St. Ry. Co. v. Railroad Comm., 24 Cal.2d 378, 150 P.2d 196. Subsequently, in the same proceeding, the utility and the City and County of San Francisco, respectively, moved for modifications of the stay order. The state contended that the provisions of the order had become final and could no longer be disturbed. The court overruled that contention, principally upon the ground that in its original order of deposit the court expressly retained jurisdiction to modify its order on the application of a party to the proceeding or upon its own motion, but also upon the ground of its inherent power to dispose of the impounded moneys. As to the nature of the fund and the court's power and duty in respect to it, the court said: "The excess fares are impounded funds in the custody of the court, although they are represented by the securities on deposit. Natural Gas Pipeline Co. v. Federal Power Comm., 7 Cir., 128 F.2d 481, 485. This court has the power and the responsibility of protecting the fund and of disposing of it in accordance with the applicable principles of law and equity for the protection of the litigants and the public whose interests are affected by the final disposition thereof." 28 Cal.2d at page 367, 171 P.2d at page 878.

[5] Confirmatory of the principle that a court of equity has inherent power to supervise the execution of its orders, even after they have become final, is the holding in Hercules Glue Co., Ltd. v. Littooy, 45 Cal.App.2d 42, and the statement, at

page 45, 113 P.2d 490, at page 491, that "a court of chancery has the inherent power 'to supervise the execution of its orders, and even to modify them in ways affecting only the details of their performance'."

[6] The complaint in the instant case invoked the equity powers of the court by requesting liquidation of the amount of plaintiff's claim upon the basis of her life expectancy, and a present award of that amount. The prayer for general relief embraced any remedy (such as the impounding of the amount awarded) which the court might find meet in equity. It was not an action or proceeding merely to establish a claim for money against an estate in probate. See discussion in Guardianship of Cornaz, 8 Cal.2d 347, 356–359, 65 P.2d 784.

We conclude, therefore, that the superior court had jurisdiction to hear and decide appellant's motion upon the merits.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

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102 Cal.App.2d 254

PASCOE et al. v. SOUTHERN CALIFORNIA EDISON CO.

Civ. 17746.

District Court of Appeal, Second District, Division 1, California.

Feb. 13, 1951.

Rehearing Denied March 5, 1951.

Hearing Denied April 12, 1951.

Action by Opal M. Pascoe, and others against the Southern California Edison Company, to recover for death of named plaintiff's decedent. The Superior Court, Los Angeles County, William B. McKesson, J., rendered a judgment sustaining a general and special demurrer, without leave to amend, to plaintiff's third amended complaint, and plaintiff appealed. The District Court of Appeal, Hanson, J., pro tem., held that upon the facts alleged no legal charge of negligence was set forth in the complaint.

Judgment affirmed.

1. Negligence 🔑108(1)

One may not, by allegation, create a legal duty that otherwise does not exist.

2. Electricity 🔑16(1, 2)

Power company was under a duty to maintain its highly charged high tension wires as they crossed state highway at a height that would not endanger normal use of highway for travel or other proper purposes, and was bound to anticipate such normal use, but it was not obligated to insulate its wires if they were placed at a distance above the highway where the current in wires would not interfere at all with normal and proper uses of highway.

3. Electricity 🔑16(2)

Maintaining a highly charged wire uninsulated at a point where it can be touched by a hand reaching up from an upstairs window is negligence.

4. Electricity 🔑19(2)

In action to recover for death of powder man who was electrocuted when fuse wire to powder charge was thrown among overhanging high tension wires when charge exploded, it was duty of plaintiff to allege height of wires above point where charge was exploded so that court could rule whether a failure to insulate wires could be regarded as negligence and accordingly, in absence of such allegation, no negligence for power company's failure to insulate was shown.

5. Electricity 🔑16(5)

Where decedent's employer notified power company that in course of its operations in widening highway it would blast portions of highway underneath high tension wires where such wires crossed a highway at a certain point, and did not specify therein date on which blasting would actually occur nor request power company to shut off electricity or insulate wires over highway or otherwise prepare its wires against blasting proposed, power company had no legal duty to act on notification at time it was received, nor six weeks later when blasting actually occurred, and accordingly power company's failure to act on such notice did not constitute negligence.

6. Explosives ⚿12

Where highway contractor undertook to enlarge and pave a highway running under high tension wires, contractor and employee had a duty not to interfere with high tension wires by blasting, but to widen highway by other method of kind and character that would not have so interfered.

7. Electricity ⚿16(1)

Where highway contractor undertook to enlarge and pave a highway running under high tension wires, notified power company of its contemplated work, but did not specify date on which blasting would actually begin, nor request that power company shut off electricity or insulate wires over highway or otherwise prepare its wires against blasting, there was no legal duty on the part of power company to warn a powder man employed by contractor of the arcing propensities of electricity carried in such high tension wires, and if duty to warn did exist, it rested on contractor.

8. Evidence ⚿9, 66

Arcing propensity of electricity is a well known fact in physical world which must be deemed to be known to all capable workmen, and especially one employed as a powder man by a highway contractor.

9. Electricity ⚿19(2)

In action to recover for death of powder man who was electrocuted when fuse wire from generator to powder charge was thrown among overhanging high tension wires when charge was exploded, complaint by powder man's widow against power company, which maintained wires, charging negligence, did not state a cause of action.

10. Negligence ⚿111(1, 3)

To raise an issue of negligence a complaint must allege fact of action or nonaction relied upon and all facts necessary to render fact proximately causal.

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Leonard Wilson, Ben Cohen, Charles H. Lynch, all of Los Angeles, for appellants.

Bruce Renwick, Rollin E. Woodbury and E. W. Cunningham, all of Los Angeles, for respondent.

HANSON, Justice pro tem.

The crucial question for decision in this case is whether the *third* amended complaint sufficiently stated a cause of action for negligence. The trial court held it did not and so sustained a general and special demurrer without leave to amend.

From the allegations of the complaint it appears that the Winston Brothers Company, the employer of plaintiff's decedent, entered into a contract sometime prior to March 1, 1948, with the state of California to enlarge and pave for a short distance Highway #99. On the latter date the Winston Brothers Company notified respondent Southern California Edison Company of the fact of its contract and that it would immediately start to widen and pave the highway and in the course of its operations would blast portions of it underneath the high tension wires of the defendant where the same crossed the highway some five miles north of Castaic. Parenthetically, it may be said the notification did not specify the date on which the blasting would actually begin *under* the high tension lines, much less it did not request that the respondent should take any affirmative action, such for instance, as shutting off the electricity of the transmission line or that it should insulate the wires over the highway or otherwise prepare its wires against the blasting proposed. Indeed, the notification, for aught that appears, did not indicate the manner, method or extent of the blasting charges that would be employed or that such charges would in any manner affect or endanger the defendant's lines.

Without any further notice or request to the respondent, the Winston Brothers Company on April 8th (about six weeks after its notification) directed its employee, the plaintiff's decedent, to blast with dynamite the portion of the highway in question.

On that date plaintiff's decedent placed a charge of dynamite in a hole prepared for it and attached to the dynamite certain fuse wires which evidently ran to a fuse box from which he contemplated setting off the charge. Where this box was located on the surface of the ground with respect to the overhead high tension wires is not disclosed by the complaint. The plaintiff's decedent thereupon caused an electrical current to pass presumably from the fuse box to the fuse wire which ignited the dynamite. The explosion not only caused a portion of the earth's surface to be thrown upwards toward the high tension wires, but the fuse wire as well. This caused high voltage electricity to flow or arc from the high tension wires down along the fuse wire electrocuting plaintiff's decedent.

On the facts thus narrated plaintiff contends that the defendant was guilty of negligence which proximately caused the death of plaintiff's decedent. Specifically plaintiff charges that defendant was negligent in four particulars: (1) That it failed to remove the high tension wires from the site of the blasting operations; (2) that it failed to insulate the wires; (3) that despite the notice it continued to transmit electricity through the wires; and (4) that it failed to warn decedent of the dangerous arcing propensities of the electricity in said wires.

[1–3] We turn first to the consideration of the legal duties owed by the defendant to the plaintiff under the circumstances as above narrated. First, it seems of some importance to note that one cannot well plead that another owes him a legal duty, where the law is otherwise; in short, one may not by the mere device of an allegation create a legal duty that otherwise does not exist. Hence, the allegations of the complaint may not transcend, but instead must be measured by what is the law. The defendant here was under a duty to maintain its highly charged high tension wires as they crossed the state highway at a height that would not endanger the normal use of the highway for travel or other proper purposes. The defendant was bound to anticipate such normal use and thus place its wires at a height that would be regarded as reasonably safe. Under the circumstances here narrated it was not obligated to insulate its wires if they were placed at a distance above the highway where the current in the wires would not interfere at all with the normal and proper uses of the highway of a character that reasonably could be anticipated. In each case this is a question of degree. Maintaining a highly charged wire uninsulated at a point where it could be touched by a hand reaching out to it from an upstairs window is negligence; not so what the defendant did here.

[4] The complaint does not tell us the height of the wires above the highway and plaintiff declined to allege that fact despite the court's orders consistently sustaining special demurrers for such failure. It was the duty of the plaintiff to allege this ultimate fact so that the court could rule whether or not a failure to insulate could or could not be regarded as negligence under the circumstances. Accordingly on the facts that were alleged no negligence for failure to insulate the wires was shown.

[5, 6] Another specific ground upon which negligence of the defendant was based is the claim that inasmuch as decedent's employer had on March 1, 1948, advised the defendant that it would *immediately* proceed to blast the highway under the high tension wires respondent should have cut out the current on a date and hour some *six weeks later* when the plaintiff's decedent for the first time unknown to the respondent actually began his blasting operations. At best, the notification of decedent's employer was one of advice. It did not request that the defendant upon its receipt should immediately cease passing current through the wire or that it should cease doing so for a period of six weeks when, at the contractor's convenience, it might be important that it do so. As we view the facts narrated we fail to see that the defendant had any legal duty to give the notification even passing consideration, much less to act on it at the time it was received or later. The state of California, it is true, had let a contract to decedent's employer under the terms of which the employer was obligated to widen and pave the highway for a price. But this did not vest in the contractor any right to demand that the defendant should cease to send current through the wires while one of its workmen was working underneath them. If the employer chose to widen the highway by blasting he did so at his own peril with a liability for damages for any property injured, such

as the property of the defendant. The defendant was not under any duty to raise its wires, to insulate them or to cut out the current therein to suit the economic necessities or convenience of the contractor. Undoubtedly any one of these objectives could have been achieved by contract—at a price to be paid by the contractor. If a contractor chooses to excavate by blasting a lot next to a ten-story building, it is plain he may not in behalf of himself and his employees merely give notice to the owner and if the owner fails to shore up the building sue for damages he may sustain if the wall in falling as a result of a blast crushes his equipment. Cf. Colton v. Onderdonk, 69 Cal. 155, at page 159, 10 P. 395; McKenna v. Pacific Electric Ry. Co., 104 Cal. App. 538, 286 P. 445. An employee of such contractor would stand no better. There was then no legal duty on the part of the defendant to heed the advice of the contractor, contained in the notification of March 1, 1948. In view of what has been said it is not necessary for us to take judicial notice of the fact, if we are entitled to do so, which we do not decide, that the high tension line involved comes from the High Sierras and constantly serves an enormous population. The only legal duty disclosed by the complaint was a duty on the part of the contractor and his employee not to interfere with the high tension wires by blasting, but instead to have widened the highway by other methods of a kind and character that would not have done so.

[7, 8] Under the facts alleged by the complaint there was no legal duty on the part of the defendant to warn the decedent of the "arcing propensities of the electricity" carried in the high tension wires. The arcing propensity of electricity is a well-known fact in the physical world which must be deemed to be known to all capable workmen, and especially one employed as a "powder-man" by a highway contractor. Even if there had been a duty to warn, the complaint does not negative that the warning was not given to the Winston Brothers Company. Morever, the complaint does not charge that any representative of defendant was present so the warning could have been given or that the defendant knew that the blasting was being done under its wires at the time or even that it was being done by plaintiff's decedent. The duty to warn, if duty there was, rested on the Winston Brothers Company and not on the defendant.

[9, 10] Upon the facts alleged we deem it plain that no legal charge of negligence is set forth in the complaint. To raise an issue of negligence a complaint must allege the fact of action or non-action relied upon and all facts necessary to render the fact proximately causal. The complaint falls far short of doing so.

Only one of the numerous decisions cited by counsel for appellant is pertinent enough to need comment. In Jackson v. Utica Light & Power Co., 64 Cal.App.2d 885, 149 P.2d 748, the point decided was that the trial court had ruled correctly in denying a notion for judgment notwithstanding the verdict which was based on the theory that the evidence did not disclose any negligence on defendant's part and that the proximate cause of the injury was an act of the decedent. In that case there was evidence that the decedent was operating a power shovel in the process of widening a state highway; that the shovel came in contact with a farmer's telephone wire which was strung upon the same poles as were the high voltage lines of the defendant, some twelve feet below the high voltage wires and the same distance above the ground. At some distance from the point of accident a pole owned by defendant had broken off at a point above the telephone line and as a consequence the high voltage wire sagged and came in contact with the telephone wire and charged it with high voltage current. It was shown that the pole which had broken off was nothing but a hollow shell and in that condition was visible upon the most casual inspection; and what is more, that there had been no inspection thereof for more than four years prior to the accident. Morever, more than five months prior to the accident the state had notified the defendant to remove its pole line from the state's right of way as the line would not only interfere with construction, but was within the line of the projected highway. The written notice given by the state was offered merely to show the defendant had notice that construction work was about to begin and that despite such notice the defendant did not even then inspect its own poles—an inspection which would have disclosed a duty on its part to remedy an existing defect. The court did not intimate, much less hold, that the failure to obey the notice was negligence.

Cases far more apropos to the facts recited in the complaint, as we view those facts, than those cited by appellant are Stackpole v. Pacific Gas & Elec. Co., 181 Cal. 700, 186 P. 354; Sweatman v. Los Angeles Gas & Elec. Corp., 101 Cal.App. 318, 281 P. 677; Hauser v. Pacific Gas & Elec. Co., 133 Cal.App. 222, 23 P.2d 1068; Dresser v. Southern Cal. Edison Co., Ltd., 28 Cal.App.2d 510, 82 P.2d 965.

For the reasons stated the judgment should be and it is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; CARTER, J., dissenting.

102 Cal.App.2d 338

BRADNER v. VASQUEZ et al.

Civ. 17761.

District Court of Appeal, Second District,
Division 3, California.
Feb. 16, 1951.

Hearing Denied April 16, 1951.

Action by Ann Smith Bradner, as executrix of the will of B. J. Bradner, deceased, against Anselmo M. Vasquez and another to recover attorney's fees. The Superior Court of Los Angeles County, William B. McKesson, J., rendered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that agreement between deceased attorney and defendant for rendition of services by attorney in connection with certain business for ten percent of all moneys received by defendants from business, which provided arrangement should cease and determine on attorney's death, was not indefinite as to duration but terminated on death of attorney and contract was not terminable at will of defendant.

Reversed.

1. Attorney and client 🔑148(1)

Where agreement between attorney and defendants for rendition of services by attorney in connection with certain business for ten per cent of all moneys received by defendants in business provided arrangement should cease and determine on attorney's death, arrangement continued and was in existence until death of attorney, and contract fixed definite period for its duration and a specific time for its termination, and defendants could not terminate contract at will. Civ.Code, §§ 1643, 2355.

2. Contracts 🔑154, 175(1)

A contract must receive such an interpretation as will make it reasonable and it must be presumed that parties meant something by language used. Civ.Code, § 1643.

3. Contracts 🔑143

In construing a contract, duty of court is first to attain an understanding of purpose and object of writing, and next to give to that purpose and object fullest effect compatible with meaning of language through which purpose and object find expression and words, phrases and sentences are to be construed in contemplation of those fundamental purposes and objects.

4. Contracts 🔑143

A contract entered into for mutual material benefit of parties is to be construed as not to defeat those objects when such construction is reasonably deducible from its terms.

5. Contracts 🔑147(1)

Where language of a contract is not absolute, intention is to be ascertained by a consideration of situation of parties and the character and condition of subject matter.

6. Contracts 🔑143

In construing contract, court must look not only to specific language employed, but also to subject matter contracted about, relationship of parties, circumstances surrounding transactions, and view terms in intent of agreement in same light in which parties did when same was formulated and accepted.

7. Contracts ⚷217

If a period of duration can be fairly implied from nature of contract, its subject matter, and the relationship of parties, contract is not terminable at pleasure of either party and court will give effect to manifest intent of parties.

8. Attorney and client ⚷147

Agreement between deceased attorney and defendants for rendition of services by attorney in connection with certain business for ten per cent of all moneys received by defendants from business, which provided arrangement should cease and determine on attorney's death, was not fatally defective merely because contract did not provide a time presently definite for its termination.

9. Contracts ⚷9(3)

A contract is not fatally defective merely because it does not provide a time presently definite for its termination.

10. Contracts ⚷9(3)

Words which fix an ascertainable event, by which the term of a contract's duration can be determined, make the contract definite and certain in that particular.

11. Contracts ⚷9(3)

If duration of contract is made to depend on an event which, in course of nature, must inevitably occur, it is definite and certain.

12. Attorney and client ⚷149

Where agreement between attorney and defendants for rendition of services by attorney in connection with certain business for ten per cent of all moneys received by defendants in business provided arrangement should cease on attorney's death, as long as there was business to attend to attorney was obligated to render his services, and term of contract was definite and there was no uncertainty which would preclude recovery of damages by attorney when defendants repudiated contract prior to attorney's death.

◆

Michael F. Shannon, Thomas A. Wood, Los Angeles, for appellant.

Burke, Marshall & Burke, Harry C. Williams, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from a judgment entered pursuant to an order sustaining without leave to amend the demurrer of defendants to plaintiff's second amended complaint in an action to recover attorney's fees. Plaintiff died after the appeal was perfected and the executrix of his will has been substituted in his place.

The second amended complaint alleged these facts. Plaintiff is an attorney at law. On November 10, 1941, plaintiff and defendants entered into the following written contract:

"Mr. & Mrs. Anselmo M. Vasquez
"3161 Winter Street
"Los Angeles
"Dear Mr. and Mrs. Vasquez:

"Relative to our conversation of recent date, it is my understanding that we agreed as follows:

"I am to attend to all of your business affairs connected with the Ohio Oil Company and Havenstrite Operator, together with preparing income tax returns and advice as to investments, for 10% of all the moneys received by you from the Ohio Oil Company and Havenstrite Operator for oil and from casinghead gasoline and dry gas.

"It is realized by me that my compensation in the near future will be rather small, but as more wells are developed, I will be more adequately compensated.

"It is understood that this arrangement shall cease and determine upon my death.

"Will you kindly sign the duplicate copy of this letter and return it to me.

"Very truly yours,
"B. J. Bradner
"B. J. BRADNER

"Accepted:
"Anselmo M. Vasquez
"Anselmo M. Vasquez
"Bertha R. Vasquez
"Bertha R. Vasquez"

Plaintiff and defendants performed all the terms and conditions of the contract until August 9, 1949. On August 9, 1949, defendant Anselmo M. Vasquez, and on August 31, 1949, defendant Bertha R. Vasquez, without cause, repudiated the contract and notified plaintiff they were no longer bound by it and would no longer make the payments therein provided. Plaintiff is, and at all times has been, ready, willing and able to perform all of the terms and conditions of the contract on his part to be performed. Defendants have not made the payments provided by the contract since they repudiated it, to plaintiff's damage in an alleged sum.

The parties agree that the demurrer was sustained on the ground that the contract does not fix any time for its duration and that therefore defendants had a right to terminate it at will.

We shall consider first the questions which the parties argue in their briefs and which they contend are determinative as to the sufficiency of the complaint. The first calls for the construction to be given to the sentence "It is understood that this arrangement shall cease and determine upon my death," considering the contract as a whole.

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if this can be done without violating the intention of the parties. Civ. Code, § 1643. An interpretation which gives effect is preferred to one which makes void. Civ.Code, § 3541." Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 166, 88 P.2d 698, 702, 89 P.2d 386. By its terms, the contract is to "cease and determine" upon the death of plaintiff. The word "cease" is defined to mean: "To come to an end; to stop; to leave off or give over; to desist. * * * To put a stop to. * * * To cause to stop or desist from some action. To bring to an end; to discontinue or leave off." Webster's International Dict., 2d Ed. Webster says that "cease" applies "to that which is thought of as *being*." The antonym of cease is "continue." Webster's Dict. of Synonyms, 1st Ed. The word "determine" is defined to mean: "To set bounds or limits to; * * * to limit in extent, scope, etc. * * * To put or set an end to; to bring to a close; to terminate." Webster's International Dict., 2d Ed. "Upon my death" means at the time of my death. In re Melcher, 24 R.I. 575, 54 A. 379, 380; Miller v. Oliver, 54 Cal.App. 495, 498, 499, 202 P. 168.

In Thomason v. Ruggles, 69 Cal. 465, 470, 11 P. 20, 23, it was held that the word "cease" as used in Article 22, section 1 of the constitution meant that the constitution "did away with" all laws then existing "which are inconsistent with this constitution." In Oakland Paving Co. v. Hilton, 69 Cal. 479, 11 P. 3, referring to the same provision of the constitution, the court said, 69 Cal. at page 485, 11 P. at page 6: "When we say ceased, we mean it went out of existence, as if repealed by a valid act of the legislature. When it ceased to have existence it was recalled or revoked." See also MacDonald v. Aetna Indemnity Co., 90 Conn. 226, 96 A. 926, 927; Lantz v. Vermont Life Ins. Co., 139 Pa. 546, 21 A. 80, 82, 10 L.R.A. 580, 23 Am.St.Rep. 202. The necessary implication from these cases is that the word "cease" connotes the end of something which then exists.

[1] The sentence in question says that "this arrangement shall cease and determine upon my death." The arrangement—the contract—is to stop, come to an end, be discontinued at the time of Mr. Bradner's death. An arrangement cannot stop and come to an end unless it is then in existence. One cannot "stop" or "cease" doing a thing unless he is doing it at the time. There must be a beginning and a continuance before an end. In the words of the Supreme Court in Oakland Paving Co. v. Hilton, supra, 69 Cal. 479, 11 P. 6, the contract is to cease "to have existence" upon the death of Mr. Bradner. Applying the word "continue," the antonym of "cease," the contract is to continue up to that time. The sentence manifestly means that the arrangement shall continue and be in existence until, and will come to an end at the time of, the death of Mr. Bradner. The contract thus fixes a definite period for its duration and a specific time for its termination.

[2] Defendants argue that the sentence in question is a condition subsequent or a conditional limitation, merely the expression of a condition or event which will terminate the contract, that "upon my death" is "an event which will bring it to an end, if it still exists when the event happens." The argument is fallacious because the law, a part of the contract, provides that death of an employee terminates the employment, Labor Code, sec. 2920, and that death of an agent terminates the agency. Civ.Code, sec. 2355. To give this construction to the contract would render the sentence meaningless surplusage and, when considered with the contract as a whole, unreasonable. A contract must receive such an interpretation as will make it reasonable. Civ.Code, sec. 1643. It must be presumed that the parties meant something by the language used. Bader v. Coale, 48 Cal.App.2d 276, 279, 119 P.2d 763.

[3–7] In construing a contract, the duty of the court is first to attain an understanding of the purpose and object of the writing, and next to give to that purpose and object the fullest effect compatible with the meaning of the language through which that purpose and object find expression. Words, phrases and sentences are to be construed in contemplation of those fundamental purposes and objects. Perry v. Gross, 172 Cal. 468, 469, 156 P. 1031. A contract entered into for the mutual material benefit of the parties, such as was the contract in the present case, is to be construed so as not to defeat those objects when such construction is reasonably deducible from its terms. Daniel v. Calkins, 31 Cal.App. 514, 517, 160 P. 1082. When the language of a contract is not absolute, the intention is to be ascertained by a consideration of the situation of the parties, and the character and condition of the subject matter. Shoemaker v. Acker, 116 Cal. 239, 243, 48 P. 62. In Miller v. Miller, 10 Cir., 134 F.2d 583, the contract did not expressly fix any period for its duration. In holding that the period could be inferred by necessary implication the court said, 134 F.2d at page 588: "It is a fundamental and well recognized rule that in construing contracts, courts must look not only to the specific language employed, but also to the subject matter contracted about, the relationship of the parties, the circumstances surrounding the transaction, or in other words place themselves in the same position the parties occupied when the contract was entered into, and view the terms and intent of the agreement in the same light in which the parties did when the same was formulated and accepted. [Citations.] * * * If, however, a period of duration can be fairly implied from the nature of the contract, its subject matter, and the relationship of the parties, the contract is not terminable at the pleasure of either party and the court will give effect to the manifest intent of the parties. 17 C.J.S., Contracts, § 398."

Considering the contract in its entirety, and giving every part some effect, although the immediate subject of our present inquiry is the meaning of an isolated sentence, it appears patent that the parties intended that the contract should not be terminable at will but that it should terminate upon the death of Mr. Bradner. The contract provides that Mr. Bradner will perform specified services for defendants. It provides that defendants will pay Mr. Bradner a specified consideration for the services. It then says, "It is realized by me that my compensation in the near future will be rather small, but as more wells are developed, I will be more adequately compensated." It is clear that the amount of money to be received pursuant to its terms is variable; that Mr. Bradner's compensation in the beginning will be inadequate —will not compensate him for the services rendered; that it will take time before he will be adequately compensated—before the compensation he will receive measures up to the services performed. It is obvious that the parties contemplated that Mr. Bradner's compensation was to increase as production increased. This could only come about if the contract continued in force and effect. It could not be done if the contract was terminable at will. It certainly cannot be said to have been the intention of the parties that defendants were to have the benefit of Mr. Bradner's services and not adequately compensate him therefor, or that Mr. Bradner was to perform services for which he would not be compensated, which would have been the case if the contract was terminable at will. It would be unreasonable to construe the sentence in question apart from the remainder and to hold that because the contract, by reason of the law, would, in any event, terminate upon Mr. Bradner's death, the sentence is surplusage and the contract does not fix a period for its duration.

[8–11] We cannot agree with the further contention of defendants that the contract is fatally defective merely because it does not provide a time presently definite for its termination. A contract is not fatally defective merely because it does not provide a time presently definite for its termination. Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 165, 88 P.2d 698, 89 P.2d 386. Words which fix an ascertainable event, by which the term of a contract's duration can be determined, make the contract definite and certain in that particular. 12 Am.Jur. 559, sec. 68; Sutliff v. Seidenberg, Stiefel & Co., 132 Cal. 63, 64 P. 131, 469; Noble v. Reid-Avery Co., 89 Cal.App. 75, 264 P. 341; Great Western, etc. v. John A. Wathen D. Co., 10 Cal.2d 442, 74 P.2d 745; Gallagher v. Equitable Gas Light Co., 141 Cal. 699, 75 P. 329; Wittmann v. Whittingham, 85 Cal.App. 140, 259 P. 63; Ehrenworth v. George F. Stuhmer & Co., 229 N.Y. 210, 128 N.E. 108. If the duration of the contract is made to depend upon an event which, in the course of nature, must inevitably concur, it is definite and certain. Brown v. Odill, 104 Tenn. 250, 56 S.W. 840, 841, 52 L.R.A. 660, 78 Am.St. Rep. 714. See also Brown v. Birmingham Waterworks Co., 169 Ala. 230, 52 So. 915, 916; Hauser v. Harding, 126 N.C. 295, 35 S.E. 586, 588; City of Superior v. Douglas County Telephone Co., 141 Wis. 363, 122 N.W. 1023, 1027. In Gunnison v. Evans, 136 Kan. 791, 18 P.2d 191, 193, the court held that a contract which permitted the defendants to occupy and use premises as long as they wished was not of uncertain duration but was for life. The fact that in some of the cases to which we have referred the contract contained the words "as long as" or "so long as" does not, as defendants argue, detract from their applicability. In each of the cases mentioned the contract did not, as the contract here does not, specify a time presently definite for its termination. The duration of the contract in the present case is made to depend upon the death of Mr. Bradner, an event which in the course of nature must inevitably occur. It is, therefore, definite and certain.

[12] We think, for an additional reason, that the term for which the parties obligated themselves was definitely stated in the contract. It was provided that Mr. Bradner was to attend to all the business affairs of his clients with Ohio Oil Company and Havenstrite Operator. As long as there was business to attend to he was obligated to render his services. The term of the contract was quite definite. There was no uncertainty as to the conditions under which Mr. Bradner was to render services and Mr. and Mrs. Vasquez were to pay the agreed compensation for them. There was no limitation of these mutual obligations as long as the described conditions existed.

We hold that the second amended complaint states facts sufficient to constitute a cause of action.

Reversed.

SHINN, P. J., and WOOD, J., concur.

102 Cal.App.2d 260

In re REIHS' ESTATE.

WEINMANN et al. v. ATTORNEY GENERAL OF THE UNITED STATES.

Civ. 17913.

District Court of Appeal, Second District, Division 1, California.

Feb. 13, 1951.

Rehearing Denied March 5, 1951.

Hearing Denied April 12, 1951.

Proceedings in the matter of the estate of Christian F. Reihs, also known as Christian F. Reiss, deceased, wherein Hermann Weinmann petitioned for determination of the interest of certain non-resident alien legatees under the will. The Superior Court, Los Angeles County, John G. Clark, J., rendered a judgment declaring that the Deutscher Hospital Verein and the Attorney General as successor to the alien property custodian of the United States, in whom the other non-resident legatees' interest had been vested, were entitled to distribution of the bequests made to the alien legatees under the will. From the judgment entered and an order denying his motion for a new trial, the petitioner appealed. The District Court of Appeal, Drapeau, J., held that the evidence sustained the trial court's finding that there had existed, at the death of the testator on November 24, 1946, under the laws of Germany a reciprocal right upon the part of citizens of the United States to take by inheritance personal property or the proceeds thereof upon the same terms and conditions as residents of Germany, and that therefore the alien legatees were entitled to take under the will.

Affirmed.

1. Aliens 🔑14

Executors and administrators 🔑303(1)

In action for determination of interest in estate under probate code section conditioning right of nonresident aliens to inherit upon existence of reciprocal inheritance rights, evidence sustained trial court's finding that, as of testator's death on Nov. 24, 1946, there had existed under laws of Germany reciprocal right upon part of citizens of United States to take by inheritance personal property, or proceeds thereof, upon same terms and conditions as residents and citizens of Germany, and therefore trial court properly concluded that the United States Attorney General, as successor in interest to pre-German nationals named as legatees, was entitled to distribution of bequest made to said legatees under will. Probate Code § 259.

2. Appeal and error 🔑1010(1)

In action for determination of interest in estate under probate code section making reciprocal inheritance rights condition of right of non-resident aliens to inherit under will of American citizen, determination of issue as to existence, translation, interpretation and effect of laws of foreign nation was one of fact, and trial court's finding, if supported by substantial evidence, would not be disturbed on appeal. Probate Code, § 259.

3. Aliens 🔑14

Under terms of probate code section making reciprocal inheritance rights condition to right of nonresident aliens to inherit, as such code section existed on November 24, 1946, burden of proof was upon party so asserting to prove absence of reciprocal right. Probate Code, § 259.

4. States 🔑4.9

California probate code section, conditioning right of non-resident aliens to take property by will or succession upon existence of reciprocal right of United States residents and citizens to take property in such aliens' country, was not unconstitutional as extension of state's power into field of foreign affairs exclusively reserved to federal government, and California did not thereby enter into forbidden domain of negotiating with foreign countries or making contract with them contrary to federal constitution. Probate Code, § 259; U.S.C.A. Const.art. 1, § 10.

5. Appeal and error 🔑977(5)

In action for determination of interest in estate under probate code section conditioning right of non-resident aliens to take property in California by will or succession upon existence of reciprocal rights of United States residents and citizens to take property in such aliens' country, trial court's order denying plaintiff's motion for new trial was not such manifest and unmistakable abuse of discretion as would justify reviewing court in interfering.

◆

George T. Goggin and Pierce Lonergan, Los Angeles, for appellant.

Harold I. Baynton, Asst. Atty. Gen. Director, Office of Alien Property, Ernest A. Tolin, U. S. Atty. Southern Dist. of California, Los Angeles, Valentine C. Hammack, Sp. Asst. to Atty. Gen., George B. Searls and Joseph Laufer, Attys., Dept. of Justice, Washington, D. C., for respondent Attorney General of the United States.

DRAPEAU, Justice.

Christian F. Reihs, a citizen of the United States and a resident of Los Angeles County, died testate on November 24, 1946. His will was admitted to probate and respondent bank qualified as executor.

The will made certain bequests to residents of the United States, as well as to certain charitable institutions. Among them was a legacy of $1,000 to petitioner, Hermann Weinmann, a half-cousin of testator and his nearest of kin in the United States.

In addition to several bequests to charitable institutions in Germany, the testator left $5,000 to Mrs. Elsa Reiss Strobel. The entire residue which consisted of personal property, he gave in equal shares to his two nephews, Carl and Gustav Reiss. The three named persons survived testator, and all reside in the City of Schorndorf, Wuerttemberg, Germany, which has been included within the American Zone of Occupation since the collapse of Germany in 1945.

By his vesting order of October 9, 1947, the Attorney General of the United States as successor to the Alien Property Custodian has taken these interests in the estate. He also appears herein for the German charitable institutions whose interests he has refrained from vesting.

The instant petition for determination of interest in decedent's estate which was filed September 30, 1948, alleges in substance that on November 24, 1946 when the testator died, American citizens had no right to take property or receive payment from German estates. Therefore, that the German charitable institutions and the three German legatees, above mentioned, are ineligible to take under section 259 of the Probate Code.

That section conditions the right of a nonresident alien to inherit upon the existence of a reciprocal right on the part of American citizens to inherit in the country of which the alien is a national.

Accordingly, petitioner as the testator's next of kin, claims all the property bequeathed to the German legatees. The Attorney General, denying the asserted absence of reciprocal inheritance rights for American citizens in Germany and relying on his vesting order, seeks distribution to himself of the legacies to the three German citizens.

Among others, the trial court found that under the German laws of inheritance in effect at the time of testator's death, "and still in force, title to an estate accruing in Germany passes by force of law as of the time of decedent's death to the person or persons designated by will or by the law of succession, regardless of nationality, domicile, or residence of said distributee or distributees.

"XI. That under the laws, proclamations and regulations issued and promulgated by the Allied Control Council for Germany and the Military Government for Germany, United States Zone, or otherwise, the German laws of inheritance, under which title to an estate accruing in Germany passes by force of law as of the time of decedent's death to the person or persons designated by will or by the law of succession, regardless of nationality, domicile or residence of such distributee or distributees, have remained in full force and effect.

"XII. That under the German laws of inheritance existing as of the date of the decedent, to-wit: November 24, 1946, the right to receive an inheritance followed the right to inherit the same."

As a conclusion of law from the facts found, the court held that petitioner had "failed to sustain the burden of establishing that the laws of Germany do not grant reciprocal rights to inherit upon the same terms and conditions as residents and citizens of Germany." Accordingly, it was adjudged that the German charitable institutions and the Attorney General, as successor in interest to the three German nationals named as legatees, were entitled to distribution of the bequests made to them under the will.

Petioner appeals from the final decree thereafter entered.

On November 24, 1946, the date of death of testator, section 259, supra, read as follows: "The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code." (Stats.1945, p. 2208, Chapt. 1160. In effect Sept. 15, 1945.)

The question presented for decision is whether on November 24, 1946, when the testator died, the law of Germany accorded to American citizens a "reciprocal right" to take personal property by will or succession "upon the same terms and conditions as residents and citizens" of Germany, pursuant to the terms of the above quoted section.

Appellant here urges that the trial court erred and exceeded its jurisdiction in making the findings of fact, hereinabove quoted, and the conclusions of law based thereon.

In this connection, it is argued that after the unconditional surrender of May 8, 1945, Germany was occupied by an international organization known as Military Government for Germany. By agreement the inhabitants were governed by the Allied Control Council under a uniform rule applying to the whole of the former German territory. That as a result, such military government and the laws promulgated to carry out its purposes "controlled the legal substantive rights of the aliens in this case to property, internal and external, in the occupied territory; that under the form of government to which these aliens were subject, the aliens in this case were not granted legal substantive vested rights or interests to property, including property in estates, in the State of California or elsewhere."

In other words, the establishment of such military government in Germany effected an abrogation of all vested rights theretofore existing under German civil law, including the right of inheritance.

In support of this theory, appellant introduced in evidence international agreements, government proclamations and various Military Government laws for the United States Zone, all of which are now before this court as exhibits in the case.

Appellant also called as an expert witness, David Brandon Bernstein, Esq., a California attorney admitted to the Bar in 1926, who was a military government officer and a Military Government Court Judge at Kassel and Frankfurt, Germany, from March of 1945 until October of 1948.

This witness in his early testimony stated that three military government laws prevented American citizens from succeeding to estates in Germany, to wit: MGUS Laws 52, 53 and 59. However, he stated that on November 24, 1946, certain of the German Courts were functioning, and that they "used the German Code, the German laws which were in existence prior to occupation, and which were not repealed, changed or modified by Military Government," referring specifically to the Fifth Book, of the German Civil Code, relating to inheritance. Also, that the Military Government Courts did not exercise jurisdiction over the laws of succession or inheritance in Germany and did not administer them, except in the interpretation of Laws 52 or 53.

Law 52 authorized the blocking and control of properties of nonresident citizens of the Allied nations, including Americans. Its language indicates that its aim is to preserve and not to destroy the interests and property of nonresidents, and although it may prevent immediate enjoyment thereof, it does not affect the right of inheritance, as such. Mr. Bernstein ventured the opinion that under this law "the right to an inheritance is not interfered with," but the American heir cannot take possession of the property without a license from Military Government under Law No. 53, the Foreign Exchange Control Law, and "then Military Government may or may not grant that license. That is discretionary."

The object of Law 59 was to return to the victims of Nazi persecution the properties of which they had been deprived by duress and other unlawful means. In any event, that law affected American and German citizens alike, and Mr. Bernstein so testified.

Article II of Proclamation No. 2 of Military Government dated Sept. 19, 1945, provided that German law in force at the time of the occupation, except as theretofore abrogated, suspended or modified by Military Government or the Control Council, should apply in each area of the United States Zone of occupation until repealed or superseded by a new law enacted by the military government.

As heretofore mentioned, Wuerttemberg, the residence of legatees is within the United States Zone of occupation.

Nowhere in Mr. Bernstein's testimony did he point to any specific military government legislation which changed or modified the German laws of inheritance. In fact the only repealing legislation brought to the attention of the trial court was that contained in respondent's Exhibit 22–a: Law No. 1 of Control Council which expressly repealed those "laws of a political or discriminatory nature upon which the Nazi regime rested."

Respondent's witness Dr. Karl Von Lewinski, a national of Germany, also qualified as an expert on German law. He studied law in this country at Harvard and Columbia Law Schools and in 1907 was appointed a judge of the County Court of Berlin where he served for a year and a half. For the next ten years he was an assistant in both the Prussian Department of Justice and the Federal Department of Justice and also a Justice of the Court of Appeals of Berlin. From 1922 to 1932 he served in the United States as German Agent for the Mixed Claims Commission, Consular of the German Embassy and Consul General in New York. Upon his return to Germany in 1932 he practiced law in Berlin until within three months of the trial herein, specializing in probate law.

He testified that he had handled four to five hundred cases in which Americans had inherited estates in Germany and vice versa; that before the war the right to inherit was recognized and the assets transferred; that the German inheritance laws are contained in the German Civil Code, Fifth Book, and that Article 154 of the Weimar Constitution enacted in 1919 recognized and guaranteed the right to inherit in accord with the Civil Code. Also, at the time here in question, there were no other laws in Germany having any bearing on the right of inheritance.

Article 154 of the Constitution and sections 1922 to 1942, inclusive, of the Fifth Book of German Civil Code, Law of Inheritance, Order of Succession, were identified by the witness and translations thereof were introduced in evidence.

With respect to the pertinent sections of the Civil Code, this witness testified that no distinction is made between nationals of Germany and foreigners, including American citizens; that under the German laws of inheritance any foreigner may succeed to an estate in Germany on the same terms as a national of that country.

When asked: "* * * the civil code relating to inheritance as set forth in the Fifth Book, is that in existence in Germany today?", appellant objected on the ground that an enemy alien is not entitled to testify in courts of this State and moved to strike the testimony. The court thereupon denied the motion and overruled the objection. The witness answered the question as follows: "The German Civil Code as it existed before the war is still in force, with changes, with amendments, which have been made by Military Government legislation." He was then asked to state "whether or not the Military Government had made any changes which have repealed, abrogated or suspended any of the German laws of inheritance, as set forth in the Fifth Book and as set forth in the Government Exhibit containing Sections 1922 to 1942, inclusive?" To this he replied: "The Fifth Book of the Civil Code, particularly the sections mentioned by counsel, 1922 to 1942, have not been changed by Control Council legislation. * * * And they are still in force." He further gave as his opinion that under German law, a German national and foreigners, including American citizens, all inherit on the same terms and conditions.

Dr. Von Lewinski was then interrogated by the trial court as follows:

"By The Court: Q. Doctor, as you know, the Court is here concerned with the question of a right of aliens, not residing within the United States, to take either real or personal property, or the proceeds thereof, in this estate (*Sic*) by succession or testamentary disposition, and that is governed by Section 259 of our Probate Code, and the question before me is to determine: Did there exist on November 23, 1946, in the Province of Wuerttemberg * * * a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of Wuerttemberg. * * * Now, this question is really reasonably simple. We will reduce it down to the elemental question and I will ask you then whether or not a nephew or nephews named as residuary legatees in a last will and testament who were United States citizens would have the right to inherit under that will property * * * of the decedent, the testator, located in the state of Wuerttemberg, Germany?

"The Witness: According to the German inheritance law, the inheritance passes to persons who are either appointed heirs by the last will of another person, or to those persons who according to the law of succession will succeed to the estate as heirs. The German law speaks of persons when it speaks of the heirs of the decedent. The German inheritance law does not make any difference between the nationals of Germany or of any other country. As I said, it speaks only of persons. The law of inheritance was in force at the time of the decedent's death. Under the law American citizens are appointed heirs. The inheritance passed and by virtue of the German inheritance law at the time of death to the heirs. That means the title passed to the heirs because they had the right to inherit."

[1] The foregoing résumé discloses amply sufficient evidence to support not only the findings of fact objected to by appellant, but as well the conclusions of law based thereon, particularly "That on the date of death of the decedent, Christian F. Reihs, to-wit: November 24, 1946, there existed under the laws of Germany a reciprocal right upon the part of citizens of the United States to take by inheritance personal property or the proceeds thereof, upon the same terms and conditions as residents and citizens of Germany."

[2] As was so aptly stated in the very recent case of Estate of Schluttig, 36 Cal. 2d 416, 224 P.2d 695, 700: "Considering the nature of the evidence before the trial court, it is clear that the issue to be determined involved questions as to the existence, translation, interpretation and effect of the laws of Germany and Austria. Upon these subjects, the superior court heard highly conflicting testimony by experts upon the laws of those countries and their application under given circumstances. The determination of the issue, therefore, was one of fact, and the finding of the trial court, if supported by substantial evidence, will not be disturbed on appeal."

Appellant cites as error the ruling of the trial court which placed the burden of proof under section 259, Probate Code, upon the petitioner.

This question is settled by the holding in Estate of Giordano, 85 Cal.App.2d 588, 590, 193 P.2d 771, 773. It is there pointed out that said section 259 was added to the code in 1941, and remained in effect until September 15, 1945, when it was amended, Stats.1945, ch. 1160. It was again amended effective as of September 19, 1947, Stats. 1947, ch. 1042. In the cited case it was said: "It thus appears that at the time of the death of the deceased, and up to September 15, 1945, the burden of proving such reciprocal rights rested on the foreign alien heir, or in this case, the Alien Property Custodian who represented her. Commencing on September 15, 1945, and to September 19, 1947, the burden of proof rested on Anna Maria Fino (petitioner). The enactments effective on September 19, 1947, returned the burden of proving reciprocal rights to the foreign heir, or, here, the Alien Property Custodian."

[3] Under the terms of the statute as of the date of death of testator here, November 24, 1946, the burden of proof was upon petitioner. Hence, there was no error in the ruling.

[4] With respect to appellant's claim that section 259, supra, is unconstitutional by reason of conflict with the Constitution of the United States, in that it attempts to grant rights which have been reserved to the federal government, our supreme court in Palermo v. Stockton Theatres, Inc., 32 Cal.2d 53, 64, 195 P.2d 1, 8, stated as follows: "Subsequent to our granting a hearing in this case, the Supreme Court of the United States, in Clark v. Allen (1947), 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633 [1638], 170 A.L.R. 953, rejected a similar contention with reference to section 259 of the California Probate Code. It was there held that although under the provisions of the state law the right of a nonresident alien to take property in California by will or succession depends upon a reciprocal right of United States residents and citizens to take property in such alien's country, and although the existence of such a reciprocal right depends in part at least upon treaties between the government of the United States and that of the particular foreign country involved, the California statute is 'not unconstitutional as an extension of state power into a field of foreign affairs exclusively reserved to the federal government, and that California has not entered into the forbidden domain of negotiating with a foreign country or of making a compact with it contrary to article I, section 10, of the federal Constitution.' (Estate of Knutzen (1948), 31 Cal. 2d 573, 577, 191 P.2d 747, 750; see also Estate of Bevilacqua (1948), 31 Cal.2d 580, 582, 191 P.2d 752.)"

[5] As has been stated repeatedly, a reviewing court will not interfere with the

action of the trial court in denying or granting a motion for new trial, unless a manifest and unmistakable abuse of discretion appears. Jordan v. Schrieber, 74 Cal.App.2d 800, 805, 169 P.2d 394. No abuse of discretion has been shown here.

This cause was fully and fairly tried, and no errors appear in the record. The findings and judgment are amply supported by the evidence.

For the reasons stated, the judgment appealed from is affirmed. The purported appeal from the order denying motion for new trial is dismissed.

WHITE, P. J., and DORAN, J., concur.

PEOPLE v. WISSENFELD et al.

Cr. 5170.

Supreme Court of California, in Bank.
Feb. 20, 1951.

Jacob Wissenfeld and others were convicted in the Superior Court, Los Angeles County, Joseph M. Maltby, J., of grand theft and a violation of the Dangerous Weapons Control Law, and defendant Wissenfeld appealed. The Supreme Court, Spence, J., held that evidence sustained conviction.

Judgment affirmed.

Carter, J., dissented in part.

Prior opinion 222 P.2d 47.

1. Larceny ⚿64(1)

While mere possession of stolen property is not alone sufficient to sustain a conviction of grand theft, such possession plus slight corroborative evidence of other inculpatory circumstances will suffice.

2. Larceny ⚿65
Weapons ⚿17(4)

Evidence sustained conviction for grand theft and a violation of Dangerous Weapons Control Law. Gen.Laws, Act 1970, § 13.

3. Criminal law ⚿1159(2)

Where there is substantial evidence tending to support verdict of jury, Supreme Court cannot, as a matter of law, substitute its judgment on facts for that of jury.

4. Criminal law ⚿1153(4)
Witnesses ⚿267

In field of cross-examination affecting credibility of a witness, trial court is given a wide discretion, and unless it can be seen that evidence is without any weight whatever in determining issue action of court in receiving it will not be reversed.

5. Witnesses ⚿383

In prosecution for grand theft and a violation of Dangerous Weapons Control Law, admitting for purpose of impeachment previous statement made by a codefendant to police wherein he admitted taking a bus trip with defendant after codefendant denied making trip and as bearing on close business and social relationship between the two men, did not constitute impeachment on an immaterial issue, and was not error. Code Civ.Proc. §§ 1868, 2051, 2052.

6. Criminal law ⚿1036(1)

Where no objection to admissibility of witnesses' testimony was interposed in trial court, alleged error in admitting testimony would not be considered on appeal, especially in absence of showing as to how such cross-examination of witness might have operated to prejudice of defendant. Const. art. 6, § 4½.

7. Criminal law ⚿1174(1)

Where jury, contrary to explicit instructions, returned against defendant a verdict of guilty on grand theft count and also for violation of Vehicle Code, and court then stated jury could not find same defendant guilty of both offenses and sent jury out again with instructions to come back with one or other of verdicts and to indicate which verdict they wanted to return, and within a few minutes they returned with corrected verdict, inasmuch as correction was made after jury found defendant guilty on both grounds, court's instruction did not reflect a feeling of any hostility toward defendant or operate to his prejudice. Vehicle Code, § 503.

8. Criminal law ⚿636(7)

In prosecution for grand theft and a violation of Dangerous Weapons Control Law, record did not establish that additional instruction was given to jury in absence of both defendant and his counsel but established that defendant was present in court.

9. Criminal law ⚿1144

All intendments and presumptions not contradicted by or inconsistent with record are in favor of regularity of proceedings in trial court. Pen.Code, §§ 1138, 1148.

◆

Enger & Hiller, Los Angeles, and Louis Thomas Hiller, Beverly Hills, for appellant.

Fred N. Howser and Edmund G. Brown, Attys. Gen., and William E. James, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Defendants Jacob Wissenfeld, Robert Victor Luke, and Karyl Dorothy Diltz were jointly charged with the crimes of (1) grand theft of an automobile, and (2) violation of section 13 of the Dangerous Weapons' Control Law of 1923 as amended, dealing with tampering with identification marks on firearms. Stats. 1923, ch. 339, p. 695, 1 Deering's Gen. Laws 1937, Act 1970, pp. 993, 999. Defendant Wissenfeld was also charged with having theretofore been convicted of two separate felonies: (1) robbery and (2) assault with intent to commit robbery. Upon arraignment, each defendant pleaded not guilty. At the commencement of the trial these proceedings were had: (1) the court, upon defendant Wissenfeld's waiver of a jury trial on the issue of the status of his two alleged prior convictions, found them to be true as charged; and (2) defendant Luke changed his plea from not guilty to guilty on the two counts. Following a trial by jury, defendant Wissenfeld was convicted on both counts and defendant Diltz was acquitted. Defendant Wissenfeld appeals from the "conviction" and the judgment rendered thereon.

As grounds for reversal, appellant urges: (1) the insufficiency of the evidence to sustain the verdicts; (2) error in the allowance of certain cross-examination of defendant Luke; and (3) misconduct of the trial court in instructing the jury. A review of the record negatives the force of appellant's respective claims and establishes that his conviction resulted from a fair trial.

On September 16, 1949, appellant, accompanied by defendants Luke and Diltz, was driving a 1941 Buick sedan automobile when he was stopped by two police officers. The officers' attention had been attracted to the Buick car because its rear license plate "was obviously wired on and was swinging." In the ensuing conversation with the officers, appellant, when asked "what seems to be the trouble with your license plate," looked at it and said that he thought "it would stay on." Upon then being asked if "the car belonged to him," appellant refused to answer and only volunteered several times that he "was staying at the Wilton Hotel." Following further questioning by the officers as to the ownership of the car, appellant finally said that it belonged to a friend but that "he didn't know" the "friend's name." The Buick car was then searched by the officers and two guns—an automatic and a .32 calibre revolver—wrapped in a paper bag were found in the glove compartment. The numbers on the revolver had been obliterated. When asked who owned the guns, all defendants remained silent. Defendants were then put under arrest.

At the trial the owner of the Buick car testified that she had parked her car in front of her house on the evening of August 22, 1949; that the next morning when she wanted to use it on an errand, she found that it was gone; that it had been locked while parked on the street, that she did not know defendants, and had given no one permission to use her car. She further stated that the license plate found "swinging" on the car at the time of the arrest of defendants was not hers; and that she had never seen the guns taken from the glove compartment of the car prior to the time of the preliminary hearing in this case.

Following his arrest, appellant was questioned again by the police officers. He still persisted that the Buick car belonged to a friend, but he would not give the name. When asked about the guns found in the car, he replied "What guns?" and refused to make any further answer. When queried about "the '41 Buick," he responded "What car"; that he did not recall anything about it; that if he was driving the car at the time of his arrest, he must have been doing so while asleep; that there would be nothing unusual about that because a "good many people, including himself," do things—"walk places, drive cars and everything else"—"while asleep." Appellant also told the police officers that he was a gambler by trade, and that he had known his co-defendant Luke for a couple of months.

One Patricia Carroll testified that she had met appellant in the early part of September, 1949, and knew him as a bookmaker; that she had ridden in the Buick car on a number of occasions with appellant and his co-defendants; that several times after various "dates" appellant had driven her home alone; that he had told her that the car "did not belong to him," that he "couldn't have anything in his name because he was involved in some transaction," and that all "his money was tied up" in certain litigation.

Defendant Luke testified on behalf of appellant and admitted his own guilt on both counts. He stated that he first met appellant at a certain night club on August 27, 1949; that appellant hired him as a chauffeur to "drive him around to certain places in Hollywood and Beverly Hills and through Los Angeles to make bets and to pick up collections"; that he had never told appellant that the Buick car was stolen. On cross-examination, he was asked about traveling to various race-tracks with appellant and, in particular, about a bus trip to Reno with appellant—a trip which he purportedly admitted having made according to a statement given to the police officers following his arrest, but which he denied at the trial. Appellant's counsel objected to such line of questioning but his objection was overruled, and defendant Luke testified that his previous statement to the police officers was false. Defendant Luke admitted that at the police station after his arrest, when he was interrogated about various matters pertinent to the possession and ownership of the Buick car and the guns, he had "refused to answer a lot of questions" with the statement "I better not talk now"; that he had never told any of the officers about his having stolen the car or having the guns but had maintained that he knew nothing about them; that the first time that he ever said anything connecting himself with the theft of the car or the possession of the guns, and tampering with the numbers thereof, was when he "pleaded guilty" in court at the commencement of the trial, followed by his testimony as a witness the next day. Defendant Luke further testified that he had purchased the guns in May, 1949, from a "fellow" he "met * * * in a bar," and that he then filed the "numbers" off the revolver; that when he went to work later for appellant, the latter did not know anything about the guns or that he kept them in the car. Defendant Luke also testified on cross-examination as to the condition of the guns when found in the glove compartment of the Buick car at the time of arrest.

Appellant did not testify nor did defendant Diltz. There was evidence that when appellant was being questioned after his arrest, he offered to plead guilty to a violation of the Weapons' Law in the particular constituting count 2, if he could be guaranteed a county jail sentence.

[1] It is apparent that the jury did not believe defendant Luke's claim as to his sole commission of the two crimes in question and his complete exoneration of appellant in connection therewith, but rather chose to believe the evidence pointing to appellant's guilt as charged. So pertinent are these matters in the record relative to count 1, grand theft of the automobile: (1) appellant's driving of the stolen car when apprehended; (2) appellant's false and equivocal statements to the police when queried as to the ownership of the car, and his claim that if he was driving at the time of his arrest, he must have been "asleep", People v. Cole, 141 Cal. 88, 90 74 P. 547; People v. Gibson, 64 Cal.App.2d 537, 539, 149 P.2d 25; People v. Turner, 86 Cal.App.2d 791, 801, 195 P.2d 809; (3) appellant's accompaniment in the car by defendant Luke, who claimed that he had stolen the car, People v. King, 122 Cal.App. 50, 53, 10 P.2d 89, and who testified that he used it with appellant in the bookmaking business; (4) appellant's need for a car in making his gambling collections and his not wanting to have one in his own name as a motive for the theft of the car, People v. Renteria, 60 Cal.App.2d 463, 471, 141 P.2d 37; (5) appellant's exercise of dominion over the car at various times for both business and pleasure; and (6) appellant's failure to take the witness stand and offer some explanation of the suspicious circumstances, People v. Miller, 45 Cal.App. 494, 495–496, 188 P. 52; People v. Renteria, supra, 60 Cal.App.2d 463, 472,

141 P.2d 37. While the mere possession of stolen property is not alone sufficient to sustain a conviction of grand theft, People v. Haack, 86 Cal.App. 390, 260 P. 913, such possession plus "slight corroborative evidence of other inculpatory circumstances" will suffice. People v. Holland, 82 Cal.App.2d 310, 312, 186 P.2d 58, 59; see, also, People v. Leary, 28 Cal.2d 727, 735, 172 P.2d 34; People v. Cataline, 54 Cal.App. 36, 38, 200 P. 1060; People v. Fain, 100 Cal.App. 439, 440, 280 P. 162; People v. Jennerjohn, 115 Cal.App. 447, 451, 1 P.2d 532; People v. Swanson, 120 Cal.App. 173, 176, 7 P.2d 380; People v. King, supra, 122 Cal.App. 50, 53, 10 P.2d 89. The time period between the date of the theft and appellant's arrest when in possession of the stolen car—some 25 days—was but another circumstance for the jury's consideration in determining the matter of his guilt in the light of the evidence that he had been driving the car on various business and social trips during that period. People v. Miller, supra, 45 Cal.App. 494, 496–497, 188 P. 52. Appellant's reliance on the case of People v. Zervas, 61 Cal.App.2d 381, 142 P.2d 946, is of no avail, for there it was only held that defendant's mere occupancy of a stolen car as a passenger but without other suspicious or incriminatory circumstances was insufficient to sustain his conviction.

With respect to the evidence bearing on count 2, tampering with identification marks on firearms, these matters in the record appear to be significant: (1) appellant's possession and driving of the stolen car when apprehended, correlated with the presence of the guns in the glove compartment of the car over which he was exercising control at that time, People v. Felix, 58 Cal.App.2d 646, 648, 137 P.2d 472; People v. Smith, 72 Cal.App.2d, Supp., 875, 877, 164 P.2d 857; see, also, People v. McKinney, 9 Cal.App.2d 523, 524–525, 50 P.2d 827; People v. Noland, 61 Cal.App.2d 364, 366, 143 P.2d 86, in making applicable the presumption that the possessor committed the crime of tampering with the identification marks, People v. Scott, 24 Cal.2d 774, 779–783, 151 P.2d 517; (2) appellant's silence when confronted with the weapons at the time of his arrest and questioned as to their ownership, and then his later equivocal statements to the police in an attempt to ward off further queries as to the reason for the presence of the guns in the car, People v. Gibson, supra, 64 Cal.App.2d 537, 539, 149 P.2d 25; People v. Turner, supra, 86 Cal.App.2d 791, 801, 195 P.2d 809; (3) appellant's need for the guns in his "collection" activities in connection with his bookmaking business; and (4) appellant's offer to plead guilty to the alleged violation constituting count 2 if he could be guaranteed a county jail sentence—as an admission of guilt. 8 Cal.Jur. sec. 194, pp. 98–99; People v. Dunlop, 27 Cal.App. 460, 466–467, 150 P. 389; People v. Boyd, 67 Cal.App. 292, 302–303, 227 P. 783; People v. Sanderson, 129 Cal.App. 531, 532–533, 18 P.2d 982; People v. Cooper, 81 Cal.App.2d 110, 117–118, 183 P.2d 67.

[2, 3] The foregoing summary of the evidence shows that appellant's objection to the sufficiency of the evidence to warrant his conviction on the two counts is not well taken. It is of no avail to appellant to cite the testimony of his codefendant Luke in an attempt to establish that the latter was the sole perpetrator of the two crimes charged, for the matter of the credibility of Luke's exonerating testimony was for the jury to resolve, and it is apparent that little reliance was placed thereon in view of his previous denial of guilt and the other evidence in the case. People v. Zabriski, 135 Cal.App. 169, 172, 26 P.2d 511. "No rule of criminal law and procedure is better established in this state" than that where "there is substantial evidence tending to support the verdict of the jury, * * this court cannot, as a matter of law, substitute its judgment on the facts for that of the jury." People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467, 470; see, also, People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Pianezzi, 42 Cal.App.2d 270, 277, 108 P.2d 685; People v. Ohman, 67 Cal.App.2d 467, 474–476, 154 P.2d 463.

[4, 5] Nor may appellant prevail in his attack upon the extent and scope of the cross-examination of defendant Luke. First to be considered is his complaint as to the

questions propounded with regard to a bus trip to Reno. At the trial defendant Luke denied having made the trip and, for purposes of impeachment, respondent's counsel undertook to read into the record a previous statement made by defendant Luke to the police wherein he had admitted having taken such trip. Code Civ.Proc., secs. 2051, 2052. Appellant's counsel objected on the ground that it was an attempt to "impeach the witness on immaterial grounds." People v. Furtado, 57 Cal. 345, 346; People v. Dye, 75 Cal. 108, 112, 16 P. 537; Moody v. Peirano, 4 Cal.App. 411, 416, 88 P. 380. In response to this objection, respondent's counsel urged the propriety of the cross-examination not only for the purpose of showing contradictory statements made by defendant Luke with regard to this trip as a test of his credibility, 27 Cal.Jur. sec. 121, p. 145, but also as bearing upon the close business and social relationship between the two men, which association the witness had apparently attempted to minimize in his testimony. The trial court overruled the objection. In the field of cross-examination affecting the credibility of a witness, the court is given a wide discretion, Code Civ. Proc., sec. 1868, and "[u]nless it can be seen that the evidence is without any weight whatever in determining the issue, the action of the court in receiving it will not be reversed." Moody v. Peirano, supra, 4 Cal. App. 411, 418, 88 P. 382. The credibility and weight to be given to the testimony of defendant Luke was a vital matter in the case, and there appears to be no error in the ruling of the trial court admitting the above-mentioned impeaching evidence for the consideration of the jury.

[6] Appellant also complains of the cross-examination of defendant Luke with respect to the condition of the guns when they were found by the police in the glove compartment of the stolen car. Irrespective of any argument sustaining the admissibility of this testimony, no objection was interposed in the trial court and the point need not be considered upon appeal. 8 Cal. Jur. sec. 516, p. 500. Moreover, there is no showing as to how this cross-examination might have operated to the prejudice of appellant. Const., Art. VI, sec. 4½.

[7] Likewise there is no force to appellant's claim that the trial court was guilty of prejudicial misconduct in its additional instructions to the jury. It appears that the jury, contrary to explicit instructions, returned against appellant a verdict of guilty on the grand theft count and also for the violation of Vehicle Code section 503 (taking and driving an automobile without the consent of the owner and with intent to deprive the owner of its title and possession). The court then said: "As to the verdicts on 503, Grand Theft, you cannot find the same defendants guilty of both offenses. You must find the defendants guilty of one or the other. I don't know what your thought about it was, which one you intended to bring in, but you cannot bring in both. I am going to send you out again and you may come back with one or the other of these verdicts and indicate to us which one you want to be the verdict." Within a few minutes the jury returned with a corrected verdict. Inasmuch as this correction was made after the jury had found appellant guilty on both grounds, the court's instruction that the jury make its choice between the two verdicts already reached, cf. People v. Jeffries, 47 Cal.App. 2d 801, 807–808, 119 P.2d 190, certainly should not, as contended by appellant, be construed as reflecting a feeling of any hostility toward appellant or as a remark operating to his prejudice. Cf. People v. Daily, 135 Cal. 104, 107, 67 P. 16.

[8, 9] Appellant also argues in this regard that the additional instruction was given to the jury in the absence of both himself and his counsel. There is no merit to his position. The record shows (1) that counsel stipulated in open court at the outset of the trial that "each defendant [was] in the courtroom * * * unless the attention of the Court [was] called to the contrary"; and (2) that upon the retirement of the jury, both appellant and his counsel stipulated that the verdict might be received in the absence of counsel. Moreover, it appears that appellant was present in court at the time in question, for immediately following the jury's return with the corrected verdict, appellant asked if he might "have a new trial" and the court ordered the record

to show the making of such request as an "oral application." Consistent with the well-settled rule on appeal that "all intendments and presumptions not contradicted by or inconsistent with the record are in favor of the regularity of the proceedings" in the court below, 8 Cal.Jur. sec. 568, p. 569, it must be concluded that appellant was present at all stages of the proceedings in the trial court. Pen.Code, secs. 1138, 1148.

The purported appeal from the "conviction" is dismissed. The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS and TRAYNOR, JJ., concur.

SCHAUER, J., concurs in the judgment.

CARTER, Justice.

I concur in the judgment of affirmance as to count 1, but dissent from the holding of the court as to count 2. The basis of my dissent will be found in my dissenting opinion in People v. Scott, 24 Cal.2d 774, 784, 151 P.2d 517.

JENNINGS v. STRATHMORE PUBLIC UTILITY DIST. et al.

Civ. 4075.

District Court of Appeal, Fourth District, California.

Feb. 28, 1951.

Trueman Jennings brought action against Strathmore Public Utility District, and others, seeking to restrain further construction of a sewage plant and asking that two contracts involving such construction be declared void. The Superior Court, Stanley Murray, J., dismissed the action and plaintiff appealed. The District Court of Appeals, Griffin, Acting P. J., held that as all construction involved had been completed before appeal was perfected, the issues involved were moot.

Motion to dismiss appeal granted.

1. Appeal and error 🔑**781(4)**

In an action to enjoin certain construction, where construction was completed before appeal from dismissal of action was perfected, the issue as to the restraining order was moot.

2. Injunction 🔑**114(2)**

In action to enjoin certain construction by a public utility district, a declaration that because of violation of prevailing wage provisions of Labor Code, the contracts were void, would not afford workman, not a taxpayer, any relief, as against contractors not parties to the action. Labor Code, §§ 1777, 1781.

3. Master and servant 🔑**69(12)**

The Labor Code provision, that the body awarding the contract or authorizing public work shall determine general prevailing wage rate, and that its decision is final, does not mean that action of the board may be arbitrary or capricious, but upon proper facts and at a proper time, its actions may be reviewed. Labor Code, § 1770.

4. Appeal and error 🔑**781(4)**

Where wage scale had been published 5 months, and contractors bids, entered in good faith, had been in 4 months, and the construction was nearly completed, before workman, not a taxpayer, attempted to question good faith of public utility district fixing prevailing wage scale, and work had been completed before appeal was perfected from dismissal of action, issues presented by appeal were moot.

5. Estoppel 🔑**58**

One cannot sit idly by and let matters take a course whereby third parties become injured and then make his complaint.

◆

P. H. McCarthy, Jr., F. Nason O'Hara and Herbert S. Johnson, San Francisco, for appellant.

Leroy McCormick, Robert E. Moock, Visalia, for respondents.

GRIFFIN, Acting Presiding Justice.

Action for injunction and to declare certain contracts void. Plaintiff and appellant brought this action against the Strathmore Public Utility District (hereinafter referred to as the district) and two contractors, Alton B. Carter and Valley Trenching Company, wherein the plaintiff seeks an injunction restraining the further construction of a sewage disposal plant and distribution lines for the district and asks that two contracts for the construction of a sewer system be declared void.

Plaintiff alleged that he was a "citizen resident" of the district and one of a class of workmen eligible for employment on such a contract; that he brought this action as such, in his own behalf and on behalf of all other persons similarly situated in said district. The complaint is that, in letting the contracts mentioned, the district acted arbitrarily, capriciously, unfairly, in bad faith, and for the purpose of evading the requirements of the Labor Code, in that, without independent investigation, it pretended to determine a prevailing wage rate (incorporated in the contracts in question) which was in fact substantially below the general wage rate for work of the same character in the same locality.

The issue before the trial court came to it based on the district's motion to dismiss plaintiff's order to show cause why a preliminary injunction should not issue, and on a motion to dismiss the action. Defendant Carter was not served with process previous to the hearing. The action was dismissed against defendant Valley Trenching Company by stipulation. The only remaining defendant was the district. The issues raised by the motions were (1) Whether the remedies set forth in the Labor Code (Sec. 1781) were exclusive; and (2) Whether plaintiff, not being a taxpayer, had sufficient interest in the subject matter to entitle him to maintain the action. After hearing affidavits presented at the hearing and after arguments, the trial court granted the motions. Plaintiff appeals from the judgment of dismissal that followed.

[1] Since the appeal was perfected, defendant district, by uncontradicted affidavits filed with this court, shows that the work, which was in the process of completion at the time of trial, has in fact been fully completed, all contractors and workmen have been paid in full, and notice of completion (copies of which were attached to the affidavit) were filed and recorded in June, 1950. Defendant's motion to *dismiss the appeal,* then made in this court, claiming that the questions presented have become moot, was submitted, together with the appeal from the order.

It becomes immediately apparent that the trial court, at this time, would be precluded from "enjoining" or "restraining" the defendant from proceeding with the work, since the work has been completed. This particular issue has become moot. McKenna v. McCardle, 97 Cal.App.2d 304, 217 P.2d 433; Stockwell v. McAlvay, 117 Cal.App. 583, 4 P.2d 167. Plaintiff does not contend otherwise as to the request for a restraining order, but argues that the question of the invalidity of the two contracts is still in issue and the order dismissing the appeal, under these circumstances, was error, citing Honan v. Title Insurance & Trust Co., 9 Cal.App.2d 675, 50 P.2d 1068. Whether the question of the invalidity of the two contracts is now merely academic or whether the action, if remanded, would be maintainable by the plaintiff under the pleadings and showing made, is therefore before us.

At the hearing it was shown that plaintiff's name was not on the great register of that county as a voter nor was it on the assessment roll as a taxpayer.

[2] As against the contractors and subcontractors, not a party to this action, a declaration that the contracts were void would not afford plaintiff any relief against them. These exclusive penalties and remedies are set forth in Sec. 1781 of the Labor Code.

Under sec 1777 thereof any officer, agent or representative of the State or of any political subdivision thereof, who wilfully violates the provisions of the article pertaining to the fixing of prevailing wage rates set forth in the Labor Code, is guilty of a misdemeanor.

[3] In the instant action, it is conceded that a prevailing wage rate was declared by the district awarding the contract and such rate was specified in the call for bids and also in the contract itself. The only contention is that the rate fixed was not in fact the prevailing wage rate for certain classes or types of labor and that the district arbitrarily fixed them. Sec. 1770 of the Labor Code provides that the body's decision in the matter of fixing those rates shall be final. In the case of Metropolitan Water District v. Whitsett, 215 Cal. 400, 419, 10 P.2d 751, 759, it is stated, however, that this finality "does not mean that the action of the board may be arbitrary or capricious, but the proper administration of the statute will be presumed." See, also, Leftridge v. City of Sacramento, 59 Cal.App.2d 516, 524, 139 P.2d 112. Certain cases indicate that upon application by a party in interest, upon a proper showing and at a proper time that the action of the rate fixing body was arbitrary, its action may be reviewed. Denver Building & Construction Trades Council v. Vail, 103 Colo. 364, 86 P.2d 267; Leftridge v. City of Sacramento, supra, 59 Cal.App.2d at page 526, 139 P.2d 112; Goodrich v. City of Fresno, 74 Cal.App.2d 31, 167 P.2d 784.

[4] The record shows that the board did adopt a wage scale in July, 1949. Notice to bidders was published showing the wage scale. There is no allegation that these contractors knew or had reason to believe that the prevailing wage scale thus adopted was not in fact the true prevailing scale. The main contract containing the prevailing wage declaration was apparently let to the contractors in August, 1949, and they, in good faith, submitted bids, based upon that declaration. It was not until December 6, 1949, that plaintiff attempted to question the good faith of the district in fixing the prevailing wage scale at a time when the work was nearing its completion.

[5] It is the rule that one cannot sit idly by and let matters take a course whereby third parties become injured and then make his complaint. People v. Ocean Shore Railroad, Inc., 32 Cal.2d 406, 196 P.2d 570, 6 A.L.R.2d 1179; 10 Cal.Jur. p. 631, sec. 16.

If plaintiff could maintain such an action because he did not like the prevailing wage scale fixed, after the work was nearly done, then any claimed "citizen resident" could, at any time, without limitation, bring an action to declare such contracts void. Furthermore, there is a possibility that only the wages of one craft might be questioned and that only for some small amount. If the prevailing wage scale is subject to review by the courts, under all conditions, and if a court should happen to determine that a public body was in error on any one small item, it could invalidate a contract irrespective of size and regardless of time, in the absence of a showing of arbitrary or capricious judgment on the part of such public body. We do not believe that the legislature ever intended any such effect to be given to the prevailing wage scale statutes. Plaintiff never was a workman for defendant district or either contractor. He claims his right of action by virtue of being a "resident citizen" and entitled to be employed on such public works. He seeks no pecuniary judgment by reason of the action of the defendant, either in his own behalf or on behalf of the workmen he claims to represent. If the trial court might determine, after a hearing of the evidence, that the contracts were void for the reason that the district acted arbitrarily, it does not appear that plaintiff was injured to the extent whereby he could recover any relief under the prayer of the complaint.

We conclude that a decision as to the validity of the contracts, at this time, after the work has been completed and after the payments have been made and where no relief under the complaint could be afforded plaintiff, would be purely academic and would serve no useful purpose.

Motion to dismiss appeal on ground issues presented on appeal have become moot granted.

MUSSELL, J., concurs.

102 Cal.App.2d 442

DI GRANDI v. DI GRANDI et al.

No. 14835.

District Court of Appeal, First District,
Division 1, California.

Feb. 21, 1951.

Rose Di Grandi sued her husband, Tom Di Grandi, and the Bank of America, National Trust and Savings Association, a corporation, for separate maintenance. Defendant husband filed a cross-complaint for a divorce from plaintiff. From a judgment of the Superior Court in and for the City and County of San Francisco, William Traverso, J., granting defendant husband a divorce, awarding him 75% of the spouses' community property and allowing plaintiff's attorneys' fees payable out of such property, plaintiff appealed. On defendant's motion to dismiss the appeal. The District Court of Appeal, Bray, J., held that the award of attorneys' fees was a separable part of the judgment, so that plaintiff's acceptance of the benefit of such portion of the judgment did not preclude her from appealing therefrom.

Motion denied without prejudice.

1. Divorce 🔑221
Husband and wife 🔑295

Though wife's attorneys' fees, granted in divorce or separate maintenance proceedings, may be made directly payable to attorneys under statute, they are granted to wife for her benefit and attorneys' right thereto is derived from wife, so that they have no greater right thereto than wife would have. Civ.Code, § 137.5.

2. Appeal and error 🔑161

A party's voluntary acceptance of benefit of judgment bars prosecution of appeal therefrom by such party.

3. Divorce 🔑178

An award of wife's attorneys' fees by judgment granting husband divorce and 75 per cent of community property, from which fees were made payable, was separable part of judgment, so that wife's acceptance of benefit of such portion thereof as result of husband's payment of amount awarded, pursuant to writ of execution procured by attorneys, did not preclude wife from appealing from judgment, as she was entitled to such fees for conduct of trial, regardless of whether any portions of judgment were reversed.

4. Appeal and error 🔑162(2)

A party accepting benefit of part of judgment does not waive right to appeal from portions with which he is dissatisfied, where his right to such benefit will not be affected by reversal of other parts of judgment.

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Sefton & Quattrin, San Francisco, for appellant.

Krinsky & Abraham, Harold J. Abraham, Oakland, for respondent.

BRAY, Justice.

Motion by defendant Tom Di Grandi to dismiss appeal by plaintiff from judgment and order denying new trial in a divorce action, on the ground that plaintiff has waived her right to appeal by the voluntary acceptance of the benefit of the judgment.

Question Presented.

Is the amount of attorneys' fees awarded to the wife's attorneys in a judgment granting a divorce to the husband and awarding him 75% of the community property, an inseparable part of the judgment?

Record.

Plaintiff wife filed an action for separate maintenance. Defendant husband cross-complained for a divorce on the grounds of extreme cruelty. After a protracted trial the court entered a judgment granting the defendant the divorce, awarded 25% of the community property to plaintiff, 75% to defendant, and attorneys' fees of $2500 to the attorneys for the wife, to be deducted and paid forthwith out of the community property. The plaintiff's motion for a new trial was denied. Pending the hearing of that motion, plaintiff's attorneys caused a writ of execution to be issued on the award to them. Pursuant to the writ defendant paid the said sum of $2500 to the sheriff. Thereafter plaintiff appealed from the whole of said judgment and from the order denying a new trial.[1] Defendant filed in this court a notice of motion to dismiss the appeal on the ground that by satisfying the judgment as to attorneys' fees plaintiff had accepted the benefit of the judgment and is thereby precluded from proceeding with the appeal. Thereafter, both plaintiff and the attorneys in favor of whom the award was made filed affidavits waiving any right to appeal from that portion of the judgment.

Is the Attorneys' Fees Award Inseparable?

[1, 2] In divorce or separate maintenance proceedings, where the court grants attorneys' fees, it in its discretion may make such fees payable "to the attorney entitled thereto, and judgment may be entered and execution levied accordingly." Civil Code, § 137.5. Notwithstanding that the fees may now be made directly payable to the attorney, they are granted to the wife for her benefit, and the right of the attorney is derived from the client, and he has no greater right than the client would have. Weil v. Superior Court, 97 Cal.App.2d 373, 376, 217 P.2d 975. Voluntary acceptance of the benefit of a judgment is a bar to the prosecution of the appeal therefrom. Swallers v. Swallers, 89 Cal.App.2d 458, 201 P.2d 23.

[3, 4] The case of Weil v. Weil, 100 Cal.App.2d ——, 224 P.2d 460, is practically determinative that the award of attorneys' fees is a separable part of the judgment here. While the Supreme Court has granted a hearing in the case, the reasoning in it is so logical and reasonable that we adopt it. In that case the husband filed an action for divorce against the wife on the ground of cruelty. She cross-complained, seeking a decree of separate maintenance, and other relief. At the trial, on what the appellate court held to be the erroneous insistance of the trial judge, she amended her cross-complaint to ask for a divorce. An interlocutory decree was entered granting her a divorce, $300 per month support for 30 months, certain jewelry and furs, and attorneys' fees in the sum of $6000, payable in three equal installments 30 days apart. As here, the award was made directly to her attorneys. She appealed from this decree, from an order denying attorneys' fees on motion for a new trial and from an order denying attorneys' fees on the appeal. Proceedings to force payment of the attorneys' fees by contempt proceedings were brought. See Weil v. Superior Court, supra, 97 Cal.App.2d 373, 217 P.2d 975, and Weil v. Weil, 97 Cal.App.2d 378, 217 P.2d 979. The wife accepted payment of one or more installments of support and a part payment had been made on the attorneys' fees. On the appeal, the husband contended that the wife had waived her right to appeal, among other grounds, by accepting support and attorneys' fees. The court stated, 100 Cal.App.2d ——, 224 P.2d 467: "The acceptance of support money and attorney's fees which were rightfully hers did not operate to waive her right of appeal. A similar situation arose in Browning v. Browning, 208 Cal. 518, 282 P. 503, where the court said that the wife, who had been successful in the action yet had appealed from portions of the judgment with which she was dissatisfied, was entitled to the amounts allowed for her support and attorneys' fees regardless of the outcome of her appeal; that the receipt by the wife of the sums of money which she had received under the terms of the judgment would not defeat her right to maintain her appeal from portions of the judgment; and even if she should be unsuccessful on the appeal she would still have been entitled to receive from her husband the sums which she actually had received. The court pointed out that it is only in cases where an appellant has received and accepted advantages from the judgment to which she would not be entitled in the event of a reversal of the judgment that her acceptance thereof operates to defeat the appeal. In the instant case there is no question as to defendant's right to attorney's fees for the conduct of the trial and plaintiff stipulated that she was entitled to support money pending appeal. The order for support pending appeal was

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[1] As no appeal lies from that order, it will hereafter be disregarded.

made effective as of November 1, 1948, the date of entry of the decree. Hence defendant did not receive at any time an amount greater than the court had declared on three occasions to be necessary for her support." The court then refers to two cases in other jurisdictions to the effect that a plaintiff who accepts the benefits of a judgment awarded to him is not estopped from appealing from unfavorable portions of the judgment where a modification or reversal of the judgment could not affect his right to the benefits he had taken. These cases are Cunningham v. Cunningham, 60 Nev. 191, 102 P.2d 94, 105 P.2d 398, and Bass v. Ring, 210 Minn. 598, 299 N.W. 679, 169 A.L.R. 980. Thus, in our case, whether plaintiff is successful on her appeal in reversing those portions of the judgment which granted the divorce and 75% of the community property to the husband, or not, she was "entitled to attorneys' fees for the conduct of the trial, the amount of which the court determined and specified in the judgment." Weil v. Weil, supra, 224 P.2d 467. Defendant relies on Storke v. Storke, 132 Cal. 349, 64 P. 578, and McCaleb v. McCaleb, 32 Cal. App. 648, 163 P. 1045, just as the plaintiff did in Weil v. Weil, supra, 224 P.2d 460. Concerning those cases the court there said, 224 P.2d at page 468:

"Both decisions are distinguishable from the instant case just as they were distinguished by the Supreme Court in Browning v. Browning, supra, 208 Cal. 518, 282 P. 503. In the Storke case the trial court had granted a decree of divorce to the husband on account of the wife's extreme cruelty, from which decree she appealed although she had received and retained the support money and attorney's fees awarded to her. The court pointed out that if she succeeded in obtaining a new trial she would have received money which she might not be able to return. * * * In the McCaleb case each party had sought a divorce. The court did not grant a decree to either but the wife was awarded support as long as the parties lived apart. The wife moved for a new trial after accepting payments for her support and the husband appealed from the order refusing to dismiss her motion for a new trial. The court confessed it was unable to reconcile Storke v. Storke with the later case of First National Bank v. Wakefield, 138 Cal. 561, 72 P. 151, but determined to follow the precedent established by the former. In First National Bank v. Wakefield, supra, the court referred to the language in the Storke case to the effect that if all provisions of a judgment are connected and dependant so that one part cannot be reversed without reversal of the whole, a party cannot enforce the portion of the judgment in his favor and appeal from that which is against him; but where the provisions of the judgment are not so interdependent that a part of the judgment cannot be set aside without a reversal of the entire judgment the party may appeal from the adverse portion of the judgment while accepting the part in his favor. * *

"In Browning v. Browning, 208 Cal. at page 525, 282 P. at page 506, pointing out that a divorce had been granted to the wife, the court distinguished Storke v. Storke, supra, and McCaleb v. McCaleb, supra, on the ground that 'in each of these cases the very question at issue upon the appeal was as to whether or not the appellant was entitled to a divorce at all, and hence, of course, entitled to the sums of money which had been paid her, but to which she would have no right in the event of a denial of a divorce.' The Browning decision compares approvingly Locke Paddon v. Locke Paddon, 194 Cal. 73, 227 P. 715, which is likewise applicable to the facts at bar. Therein it was held that the right of a wife to maintain an action to rescind a property settlement on the ground of fraud was not defeated by the fact that she had received under the agreement certain moneys which she had applied to her living expenses and which she would have been entitled to receive notwithstanding the agreement she was attempting to have set aside. Browning v. Browning was decided long after the Storke and McCaleb cases. Since it distinguishes them on the facts and is the latest expression of the Supreme Court, it must be taken to overrule the earlier decisions in whatever particulars they differ.

"It is a general rule in other jurisdictions and one that should be adhered to that where an appellant's right to a benefit secured by a judgment will not be affected by a reversal of other parts of the judgment, his acceptance of such benefit will not act as a waiver of his appeal from the portions of the judgment with which he is dissatisfied. 4 C.J.S., Appeal and Error, § 1354, pp. 1956–1957; 4 C.J., § 2389, p. 580; 2 Am.Jur. sec. 215, p. 977."

Particularly applicable here is the following language, 224 P.2d 469: "The decision in the Browning case, as well as what we have said in relation to defendant's support, applies likewise to the partial payment of the attorneys' fees allowed to defendant at the close of the trial. Such services were rendered in the trial of the action and the court awarded the amount it deemed to be reasonable therefor. Plaintiff is liable for payment of such amount regardless of the result of the appeal. The same reasoning applies to attorneys' fees as to support money since, as the court said in the Browning case 208 Cal. at page 526, 282 P. at page 506, the allowance of attorneys' fees has no relation to the remainder of the judgment and no bearing on the result of the appeal. * * * The award of attorneys' fees is separable from the other portions of the judgment and is not affected by the appeal. There is no controversy on this appeal as to whether an award of attorneys' fees should have been made or as to the reasonableness of the amount allowed by the court. Plaintiff has not appealed, therefore as to him the judgment is final. If, by reason of defendant's appeal from the entire judgment any question may be deemed to have been raised relating to her counsel fees such question has been abandoned since she has failed to assign or rely on it in her brief. * * * The value of the services rendered by defendant's attorney has been determined by the trial court and plaintiff is chargeable therewith in any event. Therefore the payment by plaintiff and the acceptance by defendant and her attorney of a portion of the amount awarded, or even the whole thereof had it been paid, does not defeat her right to appeal."

Defendant also relies on Weil v. Superior Court, supra, 97 Cal.App.2d 373, 217 P.2d 975, and Weil v. Weil, supra, 97 Cal.App.2d 378, 217 P.2d 979. In Weil v. Weil, Cal.App., 224 P.2d 460, at page 469, the very same court and judges who decided those cases state that in them "there are expressions contrary to what we have said in this opinion." After stating that those proceedings related to the right of defendant's former counsel to collect his fees from plaintiff, and did not involve defendant or any of her rights, and that the effect of their decisions was to maintain the status quo and suspend the attorney's enforcement of the judgment for his fees until the determination of defendant's appeal, the court then said, 224 P.2d 470: "When Weil v. Superior Court, supra, and Weil v. Weil, supra, were before us our attention was not called to the Browning and Cunningham cases, nor to the other authorities herein cited upon the question of attorneys' fees. For the foregoing reasons any statements in those decisions in conflict with what we have said in this opinion are expressly overruled."

Hill v. Hill, 79 Cal.App.2d 368, 180 P.2d 378, also cited by defendant, is not in point as it refused to consider the question raised here. There a motion was made to the same court which decided the Weil cases for directions as to what effect on her appeal an acceptance of payment of the award for attorney's fees would have. After pointing out what the decisions were in Storke v. Storke, supra, McCaleb v. McCaleb, supra, and Browning v. Browning, supra, the court said, 79 Cal.App.2d at page 370, 180 P.2d at page 379:

"By appellant's motion she asks this court to determine in advance of the making up of the issues on appeal whether we shall, if the question should arise, follow the rule stated in the Storke and McCaleb cases or distinguish those cases from the instant case and follow the decision in Browning v. Browning.

"We have not been cited to any case and we know of none that authorizes an appellate court to inform the litigants what the opinion of the court is upon a question that has not been raised in the action, or what its decision would be if the question should be presented."

In Swallers v. Swallers, supra, 89 Cal.App.2d 458, 201 P.2d 23, also cited by defendant, the trial court awarded the wife a divorce and the husband the real and personal property on condition that he pay her the sum of $300. The wife appealed. However, she accepted payment of this sum. The appellate court pointed out that "Except for the judgment, plaintiff would not have been entitled to receive $300, or any other sum." 89 Cal.App.2d at page 462, 201 P.2d at page 25. This distinguishes the case from ours.

Motion denied, without prejudice to the right of defendant to renew it in the event the Supreme Court adopts a contrary conclusion in the Weil case.

PETERS, P. J., and FRED B. WOOD, J., concur.

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102 Cal.App.2d 509

HOLLINGUM v. MOORE.

Civ. No. 14642.

District Court of Appeal, First District, Division 2, California.

Feb. 27, 1951.

Hearing Denied April 26, 1951.

Walter R. Hollingum brought action against Charles C. Moore to recover for personal injuries sustained while a guest in defendant's automobile. A judgment for plaintiff was entered in the Superior Court in and for the county of San Mateo, A. R. Cotton, J., and the defendant appealed. The District Court of Appeal, Dooling, J., held that evidence was sufficient to support finding that defendant motorist was guilty of wilful misconduct when his automobile collided with pole, so as to render defendant liable for injuries sustained by guest in his automobile.

Judgment affirmed.

1. Appeal and error 🔑882(3)

Where plaintiff pleaded and trial court found that plaintiff was a guest within automobile guest statute, plaintiff was bound on appeal by theory adopted in trial court.

2. Automobiles 🔑181(7)

Mere speed cannot constitute "wilful misconduct" within automobile guest statute.

See publication Words and Phrases, for other judicial constructions and definitions of "Wilful Misconduct".

3. Appeal and error 🔑996

Where conflicting inferences reasonably can be drawn from the evidence, trial court's decision is as conclusive as where the conflict arises directly from the evidence.

4. Automobiles 🔑181(1, 7)

All circumstances, including speed at which motorist was driving, may be considered in determining question of whether motorist was guilty of "wilful misconduct" within meaning of automobile guest statute.

5. Automobiles 🔑244(20)

Evidence was sufficient to support finding that motorist was guilty of wilful misconduct when his automobile collided with pole, so as to render motorist liable for injuries sustained by guest in the accident.

6. Automobiles 🔑181(1)

Although collision with pole was not proximate result of motorist's failure to respect stop sign when entering highway shortly before the collision, that failure could not be overlooked in determining whether motorist was proceeding in a wanton disregard of possible safety of his guest.

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F. E. Hoffmann, San Mateo, for appellant.

Dolwig & Gaudio, South San Francisco, for respondent.

DOOLING, Justice.

Defendant appeals from a judgment for personal injuries awarded to plaintiff after a trial without a jury. The complaint pleaded and the court found that at the time of his injuries plaintiff was a guest in defendant's automobile and the judgment is based upon a finding of defendant's wilful misconduct.

Plaintiff was the only witness to the conduct of defendant leading up to the collision with a pole which caused plaintiff's injuries and the principal question presented on appeal is whether his testimony is sufficient to support the finding of wilful misconduct. The essential portions of this testimony may be summarized as follows:

The parties met at Brisbane near the Bayshore Highway about 3:30 or 4 p. m. Defendant inquired about buying a house in which he was living and plaintiff said that since the house belonged to his wife defendant would have to talk to her about it. Defendant asked plaintiff to go with him in his car to see plaintiff's wife and plaintiff agreed. When they reached the Bayshore Highway defendant "shot right out onto the highway" without stopping for the boulevard stop sign and turned north, in the opposite direction from plaintiff's home. Plaintiff remonstrated with defendant and asked why they were going in the opposite direction and defendant said: "You just sit tight. You are going to see your cousin." Plaintiff objected and asked to be let out but defendant over plaintiff's objections continued to speed down the highway in the opposite direction from plaintiff's home, "he was driving too fast to suit me. I was frightened. I was insisting upon him letting me out; but, after he didn't stop at the stop sign there, then I did have an indication there was something rotten in Denmark, and I wanted to get out quick. Q. * * * How many times did you beg and plead with him to stop? A. A half dozen times. I would have jumped out but he was going at such a rate of speed that it was impossible * * *.

"As we were speeding down the highway, there was a truck and another car in front, and he was coming at such a speed that he must have figured on going around * * * Anyhow we lost control of the car and the next thing you know, I am through the windshield. * * * He was in the outer lane * * * There was two cars, a truck, in the center lane. * * * Well, first he started over this way (to the left) * * * and then the truck showed up.

"Q. * * * On which side of these cars did he try to pass? A. On the right hand side. * * * Evidently with that one eye, he didn't see that pole.

"Q. * * * What type of pole was this? A. Concrete.

"Q. And it was off to the right of the highway limit? A. Yes.

"Q. Do you recall what part of his car came in contact with the pole? * * * A. Right bang in the center.

"Q. * * * You did go through the windshield? A. Surely I did. * * * Slid right over the radiator."

[1] The case might well have been tried on the theory that plaintiff was not a guest and hence defendant was liable for ordinary negligence on either of two theories. 1. In accompanying defendant to see plaintiff's wife about buying her house it would seem that plaintiff was giving a benefit to the driver. Kruzie v. Sanders, 23 Cal.2d 237, 143 P.2d 704; Piercy v. Zeiss, 8 Cal.App.2d 595, 47 P.2d 818; Fachadio v. Krovitz, 62 Cal.App.2d 362, 144 P.2d 646. 2. When defendant took plaintiff against his will in a direction away from the destination agreed upon it would appear that he was not a guest since one cannot be a guest without his consent. Rocha v. Hulen, 6 Cal.App.2d 245, 253–254, 44 P.2d 478. However plaintiff pleaded and the court found that he was a guest and under the settled rule he is bound on appeal by the theory adopted in the trial court. Ernst v. Searle, 218 Cal. 233, 22 P.2d 715.

[2, 3] Defendant argues that mere speed cannot constitute wilful misconduct. This may be conceded, but where conflicting inferences reasonably can be drawn from

the evidence "the decision of the trial court is as conclusive as where the conflict arises directly from the evidence." Wright v. Delta Properties, Inc., 79 Cal.App.2d 470, 478, 180 P.2d 57, 62. The trial court drew from the evidence the inference of wilful misconduct.

[4] In determining whether the defendant was guilty of wilful misconduct the trial court was not limited to the evidence of speed alone. The defendant's entire course of conduct was before the trial court and "all of the circumstances, including the speed at which said defendant was driving, may be considered when determining the question of whether he was guilty of wilful misconduct within the meaning of the statute." Rawlins v. Lory, 44 Cal.App.2d 20, 23, 111 P.2d 973, 975.

[5] The trial court had before it the picture of a driver who shot onto the heavily traveled Bayshore Highway in disregard of a stop sign, who against his repeated protests took the plaintiff away from the agreed destination at such a rate of speed that upon collision with a pole he was thrown completely through the windshield and onto the radiator, and who after turning to the left to pass a car and finding a truck in the center lane, instead of dropping behind the car which he was attempting to pass until the center lane was clear (as is done by hundreds of drivers in similar circumstances every day) swung to the right off the traveled portion of the highway directly into a concrete pole in broad daylight. We cannot say that the inference of wilful misconduct was not reasonably drawn from this aggravated course of conduct.

[6] While there was no estimate of speed in miles per hour the trial court could infer from the fact that the collision projected the plaintiff completely through a glass windshield that the speed of the car must have been excessively high. Excessive speed coupled with the failure to stop at a stop sign has been held sufficient to support a finding of wilful misconduct, Allen v. Robinson, 85 Cal.App.2d 617, 193 P.2d 498; Browne v. Fernandez, 140 Cal. App. 689, 36 P.2d 122, and while the collision with the pole was not the proximate result of the failure to respect the stop sign, that failure cannot be overlooked in determining whether defendant was proceeding in a wanton disregard of the probable safety of the plaintiff. Cope v. Davison, 30 Cal.2d 193, 199, 180 P.2d 873, 171 A.L.R. 667; Parsons v. Fuller, 8 Cal.2d 463, 66 P.2d 430.

Defendant's subsidiary claim that plaintiff's conduct was an inducing element of the defendant's is completely answered by his testimony of repeated objections and requests to be permitted to leave the car before the collision.

Judgment affirmed.

SCHOTTKY, J., pro tem., concurs.

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102 Cal.App.2d 489

SNYDER v. SNYDER.

Civ. No. 4230.

District Court of Appeal, Fourth District, California.

Feb. 26, 1951.

N. Mae Snyder sued Benjamin Snyder in separate actions seeking a divorce and partition of certain real property, and those actions were consolidated for trial with a third parties action brought to foreclose a mechanic's lien on the property in question. The Superior Court of San Diego County, Arthur L. Mundo, J., rendered a judgment granting the divorce, declaring the mechanic's lien to be a lien on the property, and ordering the property sold and the proceeds divided equally between the husband and wife, and from that judgment the defendant appealed. The District Court of Appeal, Griffin, J., held that the evidence did not sustain the husband's contention that his transfer of his separate real property to he and his wife as joint tenants had been conditioned upon their remaining husband and wife.

Affirmed.

1. Appeal and error 🔑931(3)

Where findings of fact were waived it will be presumed on appeal that every fact essential to support of judgment was proved and found by trial court.

2. Husband and wife 🔑47(3)

Where husband and wife had separated after argument as to manner in which they held title to their respective property, and thereafter, in effecting reconciliation, they agreed that husband would transfer his real property to his wife and himself as joint tenant and that the wife would in turn transfer her bank account to the joint names of the parties, and such transfers were, in fact, thereafter made, consideration for transfer of land by husband was not necessary to its validity. Civil Code, §§ 158, 1040, 2235.

3. Husband and wife 🔑47(3)

In partition action brought by wife against husband, evidence showed that there had been consideration for transfer of land made by husband to his wife and himself as joint tenants. Civil Code, §§ 158, 1040, 2235.

4. Husband and wife 🔑47(1)

In order for presumption of undue influence to arise out of transactions between husband and wife, there must be shown, in addition to marriage relationship, such unfairness in transaction as will tend to establish that the wrongful spouse made use of the confidence reposed for purpose of gaining an unreasonable advantage over her mate. Civil Code, §§ 158, 1040, 2235.

5. Husband and wife 🔑47(1)

In partition action brought by wife against husband, evidence failed to show that any unreasonable advantage was taken by wife over husband in procuring transfer of his separate realty to parties as joint tenants. Civil Code, §§ 158, 1040, 2235.

6. Husband and wife 🔑47(1)

In partition action brought by wife against husband, evidence failed to sustain husband's contention that his transfer of real property to parties as joint tenants had been conditioned upon their remaining husband and wife. Civil Code, §§ 158, 1040, 2235.

Thomas P. Golden, San Diego, for appellant.

Atherton & Atherton and Howard B. Turrentine, all of San Diego, for respondent.

GRIFFIN, Justice.

[1] Plaintiff and defendant were married in May, 1947. A short time before their marriage defendant purchased, in his own name, certain real property which is the subject of this action for partition. At the time of their marriage plaintiff had certain money (approximately $1700) in her name in a bank. The parties separated in November, 1947, and became reconciled about January, 1948. During the period of separation, efforts were made on the part of both to effect a reconciliation. Apparently there had been some argument between them as to the manner in which they held title to their respective property. For the purpose of resolving their marital difficulties and to effect a reconciliation, it was agreed by the parties that defendant would transfer the real property standing in his name to plaintiff and himself, as joint tenants, and that plaintiff would in turn transfer her bank account to the joint names of the parties. This was done. They became reconciled and lived together as husband and wife until about June 16, when they separated. During this five months period, both parties wrote checks on the bank account. After the separation plaintiff filed an action for divorce and also this action in partition, which actions were consolidated for trial. Plaintiff was awarded a decree of divorce and at the same time the real property was ordered partitioned. It is from this judgment of partition that defendant appeals. Findings of fact and conclusions of law were waived. It is the rule that where findings of fact are waived it will be presumed on appeal that every fact essential to the support of the judgment was proved and found by the trial court. Bekins Van Lines, Inc. v. Johnson, 21 Cal.2d 135, 130 P.2d 421.

Defendant admits this rule but argues that the evidence does not support the judgment. He now claims on appeal that since the lot was defendant's separate property, title to which was standing in his own name prior to the marriage, the law presumes it to be his separate property; that the evidence does not show a *gift* of it to the wife under sec. 1040 of the Civil Code; that all transactions between husband and wife by which one obtains an advantage over the other are presumed to be entered into by the latter without consideration, citing Civil Code sections 158 and 2235, and White v. Warren, 120 Cal. 322, 49 P. 129, 52 P. 723. In this connection it is also argued that the evidence conclusively shows that there was an implied promise on plaintiff's part to reconvey the property to defendant.

The evidence shows that prior to and after the marriage, both plaintiff and defendant were employed; that defendant bought the lot in question with his money; that the salary of plaintiff was placed in the bank account and that the parties lived on defendant's income; that after their marriage, but during the separation, certain buildings were moved onto the lot, and after the reconciliation some of the money from the joint bank account, as well as from plaintiff's salary, and money earned by defendant went into the cost of reconstruction of the buildings on the lot. These buildings were never completely reconstructed.

Defendant testified he paid $3000 for the lot and $1700 for the buildings. He contracted several bills in partially reconstructing those buildings. A mechanic's lien was filed against the property. An action thereon against both husband and wife was consolidated for hearing with the other two actions herein mentioned. Judgment was rendered against them for $877.50, which was declared a lien on the property. It was ordered sold and the proceeds ordered divided equally between the husband and wife.

[2, 3] Under section 1040 of the Civil Code a voluntary transfer is an executed contract, subject to all the rules of law concerning contracts in general, except that a consideration is not necessary to its validity. Under the facts of the instant case consideration for the transfer was not necessary to its validity. Assuming for the purpose of argument that a consideration was necessary, there was sufficient evidence (though conflicting) showing a consideration for the transfer. Lieman v. Golly, 178 Cal. 544, 174 P. 33.

[4, 5] The claim that a presumption of undue influence arose by reason of the marriage is untenable. The evidence, in addition to a showing of marriage relationship, must also show such unfairness of the transaction as will tend to establish that the wrongful spouse made use of the confidence reposed for the purpose of gaining an unreasonable advantage over the mate. Taylor v. Taylor, 66 Cal.App.2d 390, 396, 152 P.2d 480; Faria v. Faria, 100 Cal. App. 177, 280 P. 187. The evidence here presented, though conflicting, does not show that any unreasonable advantage was taken over the other mate Apparently, a great portion of plaintiff's funds were expended in behalf of the reconstruction work. She obtained the divorce on the grounds of extreme cruelty of defendant, and he cannot rightfully claim that plaintiff was alone to blame for the failure of the marital reconciliation.

[6] Lastly, the claim that there was an implied promise on plaintiff's part to reconvey the property to defendant is equally untenable. The evidence does not disclose that the transfer of the real property to plaintiff and defendant, as joint tenants, was conditioned upon their remaining husband and wife. Plaintiff's testimony is opposed to any claim of conditional transfer, and indicates that it was voluntary on the part of the defendant and that as a part of the consideration she opened a joint bank account with defendant and that the monies therefrom were expended in the improvement of said property. The trial court was justified, under the facts of this case, in decreeing a partition of the property.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

GAMERAL et ux. v. DUPRE.

Civ. 17738.

District Court of Appeal, Second District,
Division 1, California.
Feb. 27, 1951.
Rehearing Denied March 12, 1951.
Hearing Denied April 26, 1951.

Isador Gameral and Bessie Gameral, husband and wife, brought action against Henri Y. Dupre to recover for damages sustained in intersectional collision of automobiles. The Superior Court of Los Angeles County, Luray J. Mouser, J., rendered a judgment for the defendant, and the plaintiffs appealed. The District Court of Appeal, Doran, J., held that Superior Court properly refused to instruct jury, as requested by plaintiffs, that defendant's claim of contributory negligence on part of one of the plaintiffs presupposed existence of negligence on part of defendant.

Judgment affirmed.

1. **Appeal and error** ⚷930(1)

On appeal, facts must be considered in light most favorable to prevailing party.

2. **Automobiles** ⚷244(11)

In action for damages sustained in intersectional collision of automobiles, evidence sustained finding for defendant.

3. **Automobiles** ⚷246(23)

In action for damages sustained in intersectional collision of automobiles, court properly refused to instruct jury, as requested by plaintiffs, that defendant's claim of contributory negligence on part of one of the plaintiffs presupposed existence of negligence on part of defendant, since plea of contributory negligence is not an admission by defendant of culpable negligence on part of defendant.

◆

Wapner & Wapner, Joseph M. Wapner and Joseph A. Wapner, all of Los Angeles, for appellants.

Bauder, Gilbert, Thompson, Kelly & Veatch and Roger E. Kelly, all of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by plaintiff from the judgment in an action for damages.

The action resulted from an automobile collision which occurred at a street intersection.

The complaint was in the usual form and the answer "was a general denial and an affirmative defense of contributory negligence."

The jury found for the defendant. The evidence is in conflict, for each contended that the other violated the crossing signals which were operating at the time.

It is urged on appeal that the evidence is "insufficient to justify the verdict" and that "the court erred in its instructions to the jury".

[1, 2] It is argued by appellant that evidence of "physical facts" refutes respondent's testimony relating to speed. That same question of course was presented to the jury and the question may be open to argument now as it was then. In that connection, it is too well settled to require citation of authority that, on appeal, the facts must be considered in the light most favorable to the prevailing party which, in effect, means that the verdict cannot be disturbed on appeal in such circumstances.

[3] With regard to the court's instructions it is argued that the court erred in refusing to instruct the jury, as requested by plaintiffs, that, "defendant's claim of contributory negligence on the part of Isador Gameral presupposes the existence of negligence on the part of defendant". It is also urged that the court erred with regard to certain rulings on evidence and cross examination relating to the same contention. The same argument was presented in Sheets v. Southern Pacific Co., 212 Cal. 509, 299 P. 71. There the court held, 212 Cal. at page 515, 299 P. at page 74, "However, such an instruction plainly tells the jury that a plea of contributory negligence is an admission of culpable negligence on the part of the defendant. This is not the law. A defendant may deny that he was guilty of any negligence, and at the same time consistently claim that, even if the jury should find that he has been negligent, the plaintiff would not have sustained any injury if it had not been

for his own negligence as a proximate cause".

No prejudicial errors appearing in the record, the judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

102 Cal.App.2d 545

FRESNO CREDIT BUREAU v. BATTEATE.

Civ. 4074.

District Court of Appeal, Fourth District, California.

Feb. 28, 1951.

Action by Fresno Credit Bureau, against A. J. Batteate on open account for purchase price of soil mineral sold and delivered to purchaser. The Superior Court, Fresno County, Ernest Klette, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Mussell, J., held that evidence was sufficient to support the findings and judgment of trial court.

Judgment affirmed.

1. Agriculture 🔑7

In action by assignee of corporate seller against purchaser on open book account for purchase price of soil mineral sold and delivered to purchaser, evidence was sufficient to support judgment on open account, or upon implied contract.

2. Account, action on 🔑21
Contracts 🔑332(1)

The distinction, as a matter of pleading, between a book account and an ordinary contract debt not founded on writing, is only important when, the statute of limitations is involved and where the question arises whether suit may be commenced within four years, or must be begun within two years after the cause of action has accrued.

3. Sales 🔑353(1)

Where sale transactions were made within two years before action on open account, and purchaser promised substantial payment on purchase price within 30 days and regular installment payments thereafter, and seller entered transaction upon books of the corporation in purchaser's name as total charge, and materials were delivered to purchaser as ordered, the distinction between pleading an open book account and an indebtedness was inconsequential.

4. Account, action on 🔑2

An "open account" is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise, consisting of a series of transactions; also one in which some item in the contract is left open and undetermined by the parties, in which sense it may exist whether there be but one item or many.

See publication Words and Phrases, for other judicial constructions and definitions of "Open Account".

Lafayette J. Smallpage and Harold J. Willis, Stockton, for appellants.

Barstow & Barstow and James H. Barstow, all of Fresno, for respondents.

MUSSELL, Justice.

Action on a book account.

The instant action, filed July 26, 1949, was brought by plaintiff as assignee of Soil Mineral Corporation to recover the purchase price of 72½ tons of soil mineral sold to defendant and delivered to him at his ranch at Farmington. It was alleged in the complaint "that within the four years last past, defendant became indebted to the Soil Mineral Corporation upon an open book account for goods, wares and merchandise sold at the special instance and request of defendant in the sum of $4,060.00. That although requested, defendant has failed, refused and neglected to pay said sum or any part thereof, and the whole thereof is due owing and unpaid."

The trial court rendered judgment for plaintiff and defendant appeals, contending that the evidence is insufficient to support the finding that there was an open book account. The argument advanced is that the proof was of an express contract relating to a single, isolated transaction and that the proof of such an express contract will not support findings of an open book account. This argument is without merit.

There is substantial evidence that in July, 1948, a salesman and officer of the Soil Mineral Corporation called upon the defendant at his ranch for the purpose of selling a quantity of soil minerals; that defendant ordered 72½ tons of the product for application to his crops and agreed to pay the sum of $4,060.00 therefor; that defendant promised a substantial payment on the purchase price within thirty days and regular installment payments thereafter; that the original purchase order indicated that the defendant agreed to pay $1,000 on the following day and the balance monthly; that upon receipt by the corporation of the order, its secretary entered the transaction upon the books of the corporation on a ledger sheet carrying the defendant's name, in which the defendant was charged with the merchandise delivered in the sum of $4,060.00; that the materials were delivered as ordered and that the defendant failed to pay the purchase price or any part thereof.

[1–3] The evidence was sufficient to support a judgment upon the cause of action based on an open book account or upon an implied contract and, as was said in Hansen v. Burford, 212 Cal. 100, 107, 297 P. 908, 911; "The distinction, as a matter of pleading, between a book account and an ordinary contract debt not founded on a writing, is only important when, as in Wright v. Loaiza, 177 Cal. 605, 171 P. 311, the statute of limitations is involved and where the question arises whether suit may be commenced within four years, or must be begun within two years after the cause of action has accrued. In the present case, all the transactions were had within two years before the complaint was filed. In these circumstances the distinction between pleading a book account and pleading an indebtedness generally seems to us inconsequential."

In the instant case, the transactions were had within two years before the complaint was filed. The evidence is that the defendant promised to make a substantial payment on the account within thirty days and regular monthly payments thereafter. Under these conditions, it is apparent that the account, although opened with a total charge would thereafter contain other items if, as and when future payments were made. The evidence also indicates that the materials were not all delivered at one time and that the total of the separate deliveries was made under one entry.

[4] As was stated in Mercantile Trust Co. v. Doe, 26 Cal.App. 246, 253, 146 P. 692, 694:

"In 1 Ruling Case Law, p. 207, it is said: 'The expression "outstanding and open account" has a well-defined and well-understood meaning. In legal and commercial transactions it is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing, and subject to future settlement and adjustment. It is usually disclosed by the account books of the owner of the demand, and does not include express contracts or obligations which have been reduced to writing, such as bonds, bills of exchange, or promissory notes.'

"In 1 Ency.L.P. p. 363, it is stated: 'An open account is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise, consisting of a series of transactions; also one in which some item in the contract is left open and undetermined by the parties, in which sense it may exist whether there be but one item or many.' "

A review of the record shows that there was ample evidence to support the findings and judgment of the trial court.

Judgment affirmed.

GRIFFIN, Acting Presiding Justice, concurs.

BANKS et al. v. PUMA et al.*

Civ. 17630.

District Court of Appeal, Second District,
Division 3, California.

Feb. 28, 1951.

Rehearing Denied March 13, 1951.

Hearing Granted April 26, 1951.

Action by Lyle H. Banks and another against Samuel J. Puma and another to recover share of profits in an alleged joint adventure. The Superior Court of Los Angeles County, Edward R. Brand, J., entered a judgment in favor of plaintiffs and defendants appealed. The District Court of Appeal, Shinn, P. J., held that where the contract clearly stated that purpose of joint adventure was the acquisition of lands and buildings, to have the buildings removed and reconditioned, and the lots as thus improved sold and the profits divided, and title to land and buildings was vested in defendants, who bore all financial responsibility in adventure, and through no fault of the parties the buildings were not able to be bought, the sole purpose of enterprise was defeated and any profits that defendants realized from sale of land were not to be divided according to terms of joint adventure.

Judgment reversed with directions.

Parker Wood, J., dissented.

1. Contract 🔑309(2)

Where from the nature of a contract it is evident that the parties contracted on the basis of continued insistence of the thing to which it relates, the subsequent perishing or destruction of the thing would excuse the performance.

2. Joint adventures 🔑4(1)

Where contract clearly stated that land and buildings were to be acquired, the buildings removed and reconditioned, and the buildings on the new lots, thus improved, to be sold and the profits divided, and the title to land and the buildings was vested in the defendants, who bore all financial responsibility, and through no fault of the parties it became impossible to acquire the buildings in question, the sole purpose of the enterprise was defeated and any profits that defendants realized from the sale of land were not to be divided according to the contract.

Michael F. Shannon and Thomas A. Wood, Los Angeles, for appellants.

Don Lake, Los Angeles, for respondents.

SHINN, Presiding Justice.

Action to recover share of profits in an alleged joint adventure. Defendants appeal from judgment in favor of plaintiffs. They contend that the purpose of the venture failed completely because of impossibility of performance and that the judgment, in effect, creates an entirely new contract and obligations which they never assumed. The facts were established by stipulations in open Court.

One of the plaintiffs, Mrs. Baker, who was a stockholder in the firm of Mullen & Bluett, learned that said firm contemplated the construction of a building on certain land on which there were five occupied buildings that were to be moved. She and plaintiff, Mr. Banks, obtained an option from Mullen & Bluett for the purchase of those buildings by Mrs. Baker or her nominee. They made an arrangement with Mr. and Mrs. Royden whereby the Roydens were to furnish the money required under the option. Plaintiff Banks negotiated for the purchase of real property to which the buildings were to be moved. On October 12, 1945, Mullen & Bluett and Mr. Royden as nominee of Mrs. Baker, entered into a written agreement whereby the former agreed to sell said buildings to the latter for $19,000 to be paid as follows: $5,000 upon the execution of the agreement, and the balance prior to removal of any of the buildings but not later than June 12, 1946. The $5,000 was paid pursuant to that agreement.

On November 1, 1945, the Roydens, as parties of the first part, and Mrs. Baker and Mr. Banks, as parties of the second part, entered into an agreement which recited that on October 1, 1945, the second parties entered into an escrow to purchase seven city lots for $17,500; that Mrs. Baker, by reason of her connection with Mullen & Bluett, had learned of its intention to sell the said five buildings, and she had discussed the purchase of said buildings, their removal to a new site, and the subsequent resale of them with Mr. Banks; that Mrs. Baker had negotiated with Mullen & Bluett for the purchase of the buildings, and her offer of $19,000 had been accepted by that company; that Mr. Banks had negotiated a purchase for a new site for said buildings at a price considerably under the market value, and he had obtained permission from the city of Los Angeles to move the buildings to the new site, and that the second parties would need further money to complete the project. The parties thereto agreed that the project was the idea of the second parties; that the first parties would furnish the money to complete the buildings in the new location; that the time, effort and commissions contributed by the second parties offset, more or less, the interest on funds invested by the first parties, and therefore the first parties waived any interest charge on the funds; the title to all property in the transaction would be vested in the first parties, that the first parties assumed all financial responsibility in the undertaking and the second parties would not be held responsible for any loss or damage resulting from the enterprise; that before any of the property should be sold an agreement to sell must be confirmed by no less than three of the parties; that all proceeds from the property sold would accrue to the first parties until their investment had been paid, and thereafter all profit from the sale of the property would be divided as follows: 50% to the first parties, 25% each to the second parties; that if it should not be deemed advisable to sell said buildings and it was decided to rent them the net profit would be divided on the same basis.

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* Subsequent opinion 236 P.2d 369.

In February, 1946, Mr. Royden transferred all his rights in the Mullen & Bluett option agreement to defendants Puma, who reimbursed the Roydens for the $5,000 which had been deposited with Mullen & Bluett, and entered into a written agreement with Mrs. Baker and Mr. Banks by which they assumed the obligations of the Roydens and also agreed to furnish all funds for the purchase, moving and reconstruction of the buildings in the new location; that title to all property in the transaction was to be vested in the Pumas; that after all expenses had been repaid to the Pumas all profits would be divided as follows: 37-½% to Pumas, 25% to Baker, 37-½% to Banks.

Defendants then deposited in escrow the full purchase price of the real property and acquired title. The Office of Price Administration had permitted notices to vacate to be given to the tenants of the houses that were to be moved. The day after such notices had been given to tenants, the Federal Agency which had the supervision of the permit which was necessary for Mullen & Bluett to erect its building, cancelled the permission that had been given to Mullen & Bluett; upon hearing this, the Housing Administration cancelled the notices to the tenants and removal of the buildings was thereby prevented. On May 14, 1947, plaintiffs gave a letter to Mr. Puma whereby they authorized him to cancel all negotiations with Mullen & Bluett pertaining to the purchase of the buildings, which was done, and the $5,000 on deposit with that company was paid to defendants. At that time the title to the seven lots stood in the names of defendants Puma, who had advanced $19,171.85 as the purchase price and incidental costs. Banks and Puma, in an attempt to sell the property, placed thereon a sign with the names, addresses, and telephone numbers of Mr. Puma and Mrs. Baker. Thereafter defendants sold the property for $25,000 without the knowledge or consent of plaintiffs. In the present action plaintiffs sought to recover their alleged pro-rata shares of the profits received by the defendants from that sale. The court found there was a profit of $4,276.69 from the sale and that plaintiff Baker should receive $1,069.17 and plaintiff Banks $1,603.76.

[1, 2] Defendants contend that when it became impossible to buy the houses, and move them, the purpose of the venture failed completely and that they held title to the lots they had purchased free from obligation to sell them, or to account to plaintiffs if they should sell them. We must agree with this contention. It was indispensable to performance by any of

the parties that they acquire title to the buildings. Their ability to acquire title was the very thing which induced them to undertake the enterprise. They expected to exercise that right and did not expect that it would be destroyed by some supervening agency which was beyond their control. It is altogether clear that except for the right they had under the option there would have been no contract and no joint undertaking. They were prevented by law from obtaining possession of the buildings through eviction of the tenants. It became legally impossible for them to perform their mutual obligations. The law on the subject is clear. It was stated in Gibbs v. Hersman, 73 Cal.App. 732 at page 739, 239 P. 350 at page 352, as follows: "It is a fundamental rule of contracts that where, from the nature of the contract, it is evident that the parties contracted on the basis of the continued existence of the thing to which it relates, the subsequent perishing or destruction of the thing will excuse the performance; and, consequently, when the contract relates to any dealing with specific things, in which the performance necessarily depends on the existence of the particular things, the condition is implied by law that the impossibility arising from the destruction of the things, without fault in the party, shall excuse the performance, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the subject of the contract. 9 Cyc. 631, quoted approvingly in Potts Drug Co. v. Benedict, 156 Cal. 322, 104 P. 432, 25 L.R.A.,N.S., 609; 6 Cal.Jur., p. 443; 5 Page on Contracts (2d Ed). § 2709." The only question as to the applicability of this rule is whether it is evident from the agreement that the contracting parties were relying upon their ability to purchase and move the buildings. We do not think it is open to doubt that they did so rely. The purpose and scope of the joint venture were clearly defined by the contracts. The land and the buildings were to be acquired, the buildings removed and reconditioned, the lots, thus improved, sold, and the profits divided. Title to the land and the buildings was vested in the defendants. They bore all financial responsibility. If any loss or damage should be suffered it would fall upon them. The relation of the parties was not that of partners. The only interest plaintiffs had in the enterprise was the right to share in the profits from sales of the lots after the buildings had been moved to them and placed in marketable condition. Through no fault of the parties this became impossible of accomplishment, and the sole purpose of the enterprise was defeated. The conditions under which plaintiffs were to share in any profits earned never came to pass. Defendants did not agree to share with plaintiffs any profits that might result from sales of the lots, unimproved with the buildings. The parties did not contract at all with relation to the situation that developed through their inability to acquire title to the buildings. The scope of the joint venture and the rights of the parties thereunder are limited by the terms of the agreement. The court could not broaden the agreement or create a new one. The effect of the judgment appealed from is to create a new contract by which defendants would be bound to share with plaintiffs profits earned in the sale of the lots when it has become impossible to acquire and install the buildings thereon. It is clear from the entire contract that the parties did not have in mind any such contingency. It is not reasonable to believe that defendants, who were running all the risk, would have agreed to divide with plaintiffs any profits made from the sale of the lots in the event that plaintiffs failed utterly to accomplish the purchase of the buildings, under their option, which was their principal contribution to the project. However this may be, there was no such agreement. The single, entire purpose of the joint venture having failed, there were no profits to be divided and it was error to award judgment in favor of plaintiffs.

The judgment is reversed, and the facts having been stipulated to, the court is directed to render judgment in favor of defendants.

VALLÉE, J., concurs.

PARKER WOOD, Justice.

I dissent. Appellants contend that governmental orders revoking the permit to construct the Mullen & Bluett building and revoking the authority to evict the tenants resulted in economic frustration and destroyed *in toto* the object and purpose of the contracting parties (appellants and respondents) and that such frustration terminated the whole contract and relieved the parties of all obligations one to another. The contract between defendants and Mullen & Bluett, regarding the purchase of the houses by defendants, was terminated by reason of the governmental orders, and under the doctrine of commercial frustration, Mullen & Bluett could not have been held liable for damages for breach of that contract. In the present case, the contract between plaintiffs and defendants was a contract entered into by joint adventurers. Plaintiff Baker's contribution to the enterprise was the information regarding the proposed sale of the houses by Mullen & Bluett and removal of the houses to a new location. Plaintiff Banks contributed the information that the vacant lots involved here were available for purchase as a place to which the houses could be moved, and he negotiated the purchase of the lots at a price which, according to the agreement of all the parties, was considerably under the market value. The defendants advanced the money for the purchase of the lots. Plaintiffs had done all that was required of them up to the time the Government made the order which prevented the moving of the houses, and it appears that they had done all that would have been required of them if such order had not been made, except the general matter of assisting in negotiations pertaining to moving and reconstructing the houses. Defendants had done all that was required of them up to the time the order was made, and by reason of that order they were relieved of their further obligation to provide additional money for purchasing, moving, and reconstructing the houses. It is to be noted that the written contract between the parties recited that Banks had negotiated the purchase of the lots involved here at a price which was considerably under the market value. It must be concluded that the profit realized from the sale of the lots was attributable only to the combination of contributions which each party made to the venture. All the parties acted in good faith, and it was not the fault of any of them that the joint enterprise could not proceed further. When they could not proceed further, the defendants then held the title to the lots which had been purchased, through the efforts of Banks, at a price considerably under the market value.

This is not an action against the defendants to recover damages for a breach of their contract to furnish the additional money which would be required to purchase, move and reconstruct the houses. (The written option to purchase the houses for $19,000 stood in the name of defendants.) They had been relieved of those obligations by the governmental order. The action here is for an accounting as to profits which had resulted from the combined efforts of the joint adventurers. The object of plaintiffs and defendants in entering into the joint adventure agreement was to make a profit from the transaction. A profit was realized, even though the transaction was not completed, because Banks had located the lots and negotiated a good bargain in the purchase of them, and the defendants had advanced the money to buy them. Presumably if the houses could have been moved and reconstructed a greater profit would have been realized. The fact, however, that the governmental order prevented the completion of the project, and the profits realized were smaller than the anticipated profits, does not constitute economic frustration of the obligation of defendants to account for profits which they received only as a result of having been parties to the joint adventure agreement. In my opinion, the fact that a project of joint adventurers is not completed as originally planned should not be a defense by a coadventurer in an action for an accounting as to profits. Many joint adventures are not completed as originally planned, and profits result therefrom. If in the present case the project had been completed except as to the removal of one or two of the five houses, could it be said properly that the defendants should not be required to account for profits? The defendants reaped a benefit from the joint efforts and work of the coadventurers. It is true, of course, that the title to the lots involved here stood of record in the name of defendants. Those lots were obtained and held by defendants as trustees for the benefit of the coadventurers. "Where the evidence clearly shows the parties' intention to engage in a joint enterprise for profit it has been held that the principles governing joint venture apply irrespective of how title to the property is taken. [Citations.] Each co-adventurer or partner is a trustee for the other and neither may reap a personal pecuniary advantage from the use of the partnership property." Larson v. Thoresen, 36 Cal.2d 666, 226 P.2d 571, 573. In my opinion the doctrine of economic frustration is not applicable herein, and the judgment should be affirmed.

Rehearing denied; WOOD, J., dissenting.

102 Cal.App.2d 449

GERRY v. NORTHRUP.

Civ. 17750.

District Court of Appeal, Second District, Division 1, California.

Feb. 21, 1951.

Hearing Denied April 19, 1951.

Suit by Theora A. Gerry against Jessie Northrup to establish right to equitable redemption of realty from execution sale. The Superior Court of Los Angeles County, William R. McKay, J., entered an adverse judgment and plaintiff appealed. The District Court of Appeal, Hanson, J. pro tem, held that fact that judgment creditor, when she purchased realty at execution sale, knew of facts, accessible but unknown to judgment debtor's grantee, which purchaser believed would invalidate prior liens of record did not entitle judgment debtor's grantee to equitable redemption after expiration of statutory period of redemption.

Judgment affirmed.

1. Execution 🔑295

Contention that judgment creditor, having purchased realty at execution sale, took title subject to all prior liens of record and could not legally challenge their validity and that judgment debtor's grantee, having acquired first trust deed on realty in name of third person, could have sold realty thereunder free of inferior liens and that judgment creditor would not have redeemed but for his wrongful challenge of validity of other liens of record prior to judgment lien did not show that judgment debtor's grantee was entitled to equitable redemption of realty from execution sale after expiration of statutory period of redemption.

2. Fraudulent conveyances 🔑226, 230

Judgment creditor may acquire a lien on realty owned by judgment debtor or conveyed by him by deed, mortgage, trust deed, or otherwise in fraud of creditors by having execution issue and causing it to be levied on such land or by recording an abstract of judgment in the county in which such land is located.

3. Fraudulent conveyances 🔑181(1)

A fraudulent conveyance or mortgage is regarded in law as void and so far as existing creditors are concerned, the title and ownership of the property remains in the fraudulent grantor as fully as though no transfer had been attempted.

4. Execution 🔑267

A judgment creditor purchasing realty at execution sale has the specific right to exercise his own rights under the law in addition to the right, title, interest, and claim of judgment debtor acquired by virtue of such purchase.

5. Execution 🔑294

That judgment creditor, when she purchased realty at execution sale, knew of facts, accessible but unknown to judgment debtor's grantee, which purchaser believed would invalidate prior liens of record and fact that grantee for want of such knowledge failed to redeem within statutory period because total of valid and invalid liens exceeded value of realty did not entitle judgment debtor's grantee to equitable redemption after expiration of statutory period of redemption, since judgment creditor owed debtor's grantee no duty of disclosure.

Guthrie, Darling & Shattuck, Los Angeles, for appellant.

Maurice Gordon, Los Angeles, for respondent.

HANSON, Justice pro tem.

The only question presented is whether the trial court, in the exercise of its equitable jurisdiction, erred in its refusal to permit the title owner of a realty to redeem, something over a year after the statutory right of redemption had expired, the property sold on execution sale to a judgment creditor.

Appellant first contends that the court exercised its equitable jurisdiction erroneously, because the judgment creditor in bidding at sale of the property was aware of the fact that two liens thereon (one a mortgage, the other a trust deed) were invalid, whereas appellant lacked such knowledge and as a consequence failed to redeem the property within a year after its sale. In short, appellant's contention is that she would have redeemed the property had she known what the judgment creditor knew, but for want of that knowledge she did not redeem because the two liens thereon, subsequently determined by the courts to be invalid, taken together with the valid lien exceeded the value of the property. This mistake on appellant's part is not attributed to any false representations by or fraud on the part of respondent, but merely as a fact which should have required the court to rule in appellant's favor. We fail to see the logic of appellant's argument.

Another contention of appellant is that when a judgment creditor levies on real estate and causes a sale thereof and becomes the purchaser he takes title subject to all prior liens of record and may not challenge their validity.

The record in this case discloses that this is one of a series of three cases which have reached this court, cf. Beadle v. Northrup, 90 Cal.App.2d 510, 203 P.2d 552; Northrup v. Security Title Insurance & Guarantee Co., 90 Cal.App.2d 518, 203 P.2d 557, involving the rights of these and other parties to a five-unit apartment house located in Whittier.

Some time prior to June 24, 1939, John Wight and his then wife Susan acquired the property mentioned subject to a first trust deed placed on the property in 1929 by its then owner. On June 24, 1939, the Wights executed a second trust deed to the property to secure a note of $3,500 in which the beneficiary and payee of the note was the wife of one Lincoln A. Freeman. After it was duly recorded Mrs. Freeman transferred her interest in the note and trust deed to one Pepperdine as collateral security to a note held by Pepperdine executed by Mr. Wight and her husband Mr. Freeman. These two men at that time and subsequently thereto were jointly engaged in dealing in oil royalties and oil leases in the state of Montana.

In 1942 the respondent herein instituted an action against John Wight and his wife which went to trial on February 9, 1943, and resulted in a money judgment a few days later in favor of the respondent. On the day that case went to trial John Wight and his wife Susan executed a mortgage in the principal sum of $7,600 upon the property here involved to their daughter, Mrs. Mildred Beadle. The mortgage was recorded on the day following, and hence antedated of record the later judgment lien of respondent.

On June 25, 1945, John Wight and his then wife Susan conveyed the property here involved to appellant Theora A. Gerry (the present wife of John Wight). The deed was made subject only to the unpaid balance of the first trust deed which at the time amounted to a little less than $6,000. It is the testimony of appellant that Wight at the time of the conveyance orally agreed he would clear the property of the other encumbrances, i. e., the second trust deed, the mortgage to his daughter, and respondent's judgment lien which together aggregated approximately the sum of $14,000. She also testified that the consideration she paid to Wight for his equity was $5,800, but the court found she paid no consideration whatsoever. This finding of the court is not here challenged.

Some time prior to November 5, 1945, respondent caused execution to issue and the property here involved was sold on that date by the sheriff to the respondent for the sum of $3,458.96. No redemption having been made on or prior to November 5, 1946, the sheriff on November 13, 1946, issued his deed to respondent.

On September 1, 1945, prior to the execution sale on November 5, 1945, Wight advised appellant, according to her testimony, that he would be unable to clear her property of the second, third, and fourth liens thereon as he had agreed to do; that he then told her he would loan her the $5,800 he had received from her for the property so that she, with additional financial assistance from his lawyer, could purchase the first trust deed and foreclose it and thereby eliminate the subsequent liens. Pursuant to the suggestion thus made the first trust deed was acquired by appellant and Wight's lawyer Kaye in the name however of a third person. Thereupon proceedings of foreclosure of that first trust deed were commenced, but at the instance of respondent were enjoined to await court decisions as to validity of the mortgage and the second trust deed.

[1] Appellant, aside from her contention that the court should have granted her the right to redeem for want of her knowledge as to the invalidity of the liens mentioned, also contends that the respondent judgment creditor purchased the property subject to all prior liens of record and hence legally could not challenge their validity. Upon the latter premise appellant argues that, but for the wrongful challenge, she would not have been enjoined from selling the property under the first trust deed. If she had not been enjoined, so runs the argument, she could have sold the property free of the inferior liens, and that without any determination of the invalidity of the liens of the mortgage and second trust deed, the respondent would not have redeemed. This for the reason that such liens plus that of the lien of the first trust deed exceeded the value of the property. Hence, she contends equitable redemption should now be accorded to her. While we see no merit whatever to the argument, we think we should discuss briefly the basic fallacy which underlies it.

[2-4] When the defendant Jessie Northrup obtained her money judgment against John and Susan Wight several procedures looking toward its satisfaction were open to her. If she was of the opinion, or had knowledge, that her debtor owned land in Los Angeles County or had conveyed land therein by deed, mortgage, trust deed or otherwise to defraud creditors, she was entitled to have execution issue and cause it to be levied on such land and thereby obtain a lien or if she chose she could have recorded an abstract of judgment in Los Angeles County and achieve an equally effective lien. In either event the lien she would have obtained would be subject only to prior valid liens or titles. If any of the apparent encumbrances did not really exist, i. e., if they were fraudulent and void or voidable, or though once valid had been fully paid, all such were open to being contested. In the case of a fraudulent conveyance or mortgage the law regards such an instrument as being void, and accordingly "So far as existing creditors are concerned, the title and ownership of the property remains in the fraudulent grantor as fully as though no transfer had been attempted." First Nat. Bank of L. A. v. Maxwell, 123 Cal. 360, 55 P. 980, 983. Loose language found in some of the decisions in this state to the effect that all a judgment creditor acquires by a judgment lien, execution, levy, and sale is the "right, title, interest, and claim" of the debtor is inaccurate and too narrow. What the creditor attains is not only those rights but also, the specific right to exercise his own rights under the law.

There remains then for consideration only the question whether the appellant was entitled to equitable redemption simply because the respondent knew, and the appellant did not, that the mortgage and the second trust deed were invalid.

[5] Initially it needs to be observed that it is not accurate to say that respondent

knew that the liens were invalid. What she knew was certain facts which she believed would be held by a court sufficient to declare the liens invalid. To have them so declared called for affirmative action on her part in the courts. The facts which respondent ascertained through her alertness, could as easily, if not more easily have been ascertained by the appellant in view of the fact she had been employed by Wight and shortly thereafter became his wife. But, that aside, the respondent owed plaintiff no duty to disclose what she knew and the law accords plaintiff no redress for her own neglect in ascertaining the facts and as a corollary acting upon them. Cf. Smith v. Randall, 6 Cal. 47; 21 Am.Jur. 179, 180.

The decision below was correct and it is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; CARTER, J., dissenting.

102 Cal.App.2d 529

FITZGERALD v. PROVINES.

Civ. 17693.

District Court of Appeal, Second District, Division 3, California.

Feb. 28, 1951.

Rehearing Denied March 28, 1951.

Laura E. Fitzgerald brought action against William G. Provines for declaratory relief, to impress a trust, and for an accounting. The Superior Court of Los Angeles County, Carl A. Stutsman, J., rendered a judgment in favor of the plaintiff, and the defendant appealed. The District Court of Appeal, Wood, J., held that evidence sustained finding that plaintiff and defendant were joint adventurers in purchase of apartment building, and that relationship of borrower and lender did not exist.

Judgment affirmed.

1. Joint adventures 🔑1.7

A provision to share losses may be implied in a joint adventure agreement and need not be expressed.

2. Joint adventures 🔑1.7

The omission of a provision for sharing of losses in a joint adventure is immaterial because the law applies that provision, and, in absence of agreement, losses are shared in same proportion as profits are to be divided.

3. Joint adventures 🔑1.15

In determining whether a joint adventure was created, court was entitled to consider not only the spoken words of the parties but also their acts.

4. Joint adventures 🔑1.15

Evidence sustained finding that there was a joint adventure to purchase apartment building for purpose of selling it and obtaining a profit, and that relationship of parties was not that of lender and borrower.

5. Joint adventures 🔑1.15

Evidence was sufficient to justify finding that there was a consideration for joint adventure agreement.

6. Usury 🔑16

Where evidence sustained finding of trial court that transaction was a joint adventure and not a loan, contention that the transaction was usurious was not sustainable.

7. Frauds, statute of 🔑56(9)

Joint adventure agreement for purchase of apartment building was not within the statute of frauds because oral, since a joint adventure in a purchase and sale of realty may be formed by parol agreement.

8. Joint adventures 🔑4(1)

Each co-adventurer occupies a fiduciary relation to the other.

9. Joint adventures 🔑5(1)

Where plaintiff had no reason to believe that defendant would repudiate joint adventure agreement for purchase of apartment building and for sale at profit, and she believed that defendant's partner, in whom she placed a high degree of trust and confidence, was active in operating the apartment building pursuant to agreement until a few months prior to commencing action for declaratory relief, to impress a trust, and for an accounting, the action was not barred by laches.

10. Limitation of actions ⚷100(7)

Where plaintiff did not have any information that defendant had repudiated joint adventure agreement until a few months before she commenced action for declaratory relief, to impress a trust, and for an accounting, action was not barred by statute providing that an action based on fraud or mistake must be commenced within three years after discovery, by aggrieved party, of facts constituting the fraud or mistake. Code Civ.Proc. § 338, subd. 4.

11. Limitation of actions ⚷95(1)

Where plaintiff did not have any information that defendant had repudiated joint adventure agreement until a few months before she commenced action for declaratory relief, to impress a trust, and for an accounting, action was not barred by statutory provision that an action on a contract not founded on an instrument in writing must be commenced within two years. Code Civ.Proc. § 339, subd. 1.

12. Joint adventures ⚷4(4)

Where it was the intention of the parties to joint adventure agreement for purchase of apartment building and for resale at profit, that plaintiff should be repaid amount she had advanced in order to make purchase of building possible, acceptance by plaintiff of repayment from defendant did not extinguish plaintiff's interest in the building.

13. Joint adventures ⚷4(1)

Defendant as a party with plaintiff to joint adventure agreement for purchase of apartment building and for resale for profit, had duty to disclose the payment by vendor of commission on the sale to defendant and his partner in real estate business, and where defendant failed to do so and received commission without knowledge or consent of plaintiff, defendant was properly required to account for his secret profit.

Arthur E. Briggs, Los Angeles, for appellant.

William Ellis Lady, Los Angeles for respondent.

PARKER WOOD, Justice.

Action for declaratory relief, to impress a trust on certain real and personal property, and for an accounting. Judgment was in favor of plaintiff, and defendant appeals therefrom.

Appellant contends that the trial court erred in finding that plaintiff and defendant were joint adventurers and, as such, the owners of the real property; and that said finding is not supported by the evidence.

At the time the transaction involved herein took place, John E. Reuter and defendant, William G. Provines, real estate brokers, occupied the same office, shared the expenses, and divided equally the profits they made. On September 20, 1944, a Mr. and Mrs. Duffy listed for sale with said brokers a 12-unit apartment house which was fully furnished. In January, 1945, John E. Reuter had a conversation with plaintiff, whom he had known about 20 years, relative to selling the Duffy property to her. Plaintiff told him that she would purchase the property for $20,000. Thereafter plaintiff signed escrow instructions and entered into an escrow pertaining to the purchase of said property. A few days later, she decided that she should not continue with the transaction, and she told Mr. Reuter she thought she should withdraw from it. Mr. Reuter stated that it was a good deal and that if he had the money he would buy it himself. Plaintiff then offered to lend Mr. Reuter the money, and Mr. Reuter told her to go ahead with the transaction and that he would take it over. He also told plaintiff that he would give her one-third of the profits. Plaintiff completed performance of her escrow agreement by depositing with the escrow holder $7,500, her promissory note for $12,000 and, as security for said note, a first trust deed upon the property. She had previously paid $500 into escrow. At the close of escrow plaintiff received a grant deed, executed by the Duffys, whereby the property was conveyed to her, and defendant and Reuter (without the knowledge of plaintiff) each received $500 as commission for the sale of the property. On January 30, 1945, during the period of the above escrow, plaintiff, defendant and Reuter entered into another escrow pertaining to the same property. Pursuant to that escrow agreement, plaintiff conveyed the property to Reuter and defendant as tenants in common. Reuter and defendant assumed the first trust deed (securing the indebtedness of $12,000), executed their promissory note, payable to plaintiff on or before April 1, 1946, in the sum of $8,000 (the amount plaintiff had paid in the first escrow) and executed a second trust deed upon the property as security for said note. The deed from the Duffys to plaintiff (dated January 29, 1945) and the deed from plaintiff to defendant and Reuter (dated January 30, 1945) were recorded on February 16, 1945. Reuter and defendant then went into possession of the property, and they operated the apartment house about 1½ years. During that time they collected the rents, and from said income they paid all expenses, made payments on the first promissory note, and paid interest to plaintiff on the second promissory note. At the end of that period there was a balance of approximately $400 in the bank. In June, 1946, without the knowledge of plaintiff, Reuter sold his interest in the property to defendant for the sum of $1,500. At this time defendant signed a statement, prepared by Reuter, which was in part as follows: "At the time we bought this property and got a loan from Laura E. Fitzgerald of $8,000.00 on a 2nd Trust Deed, we agreed that at the time of sale that she was to receive One-Third of the Net Profit of the Sale Profit. I therefore agree at the time of the sale to comply with this agreement (profits to be figured to amount sold over $20,000.00)." About August, 1948, defendant notified plaintiff that he had the money ready to pay the note she held. Thereafter plaintiff's attorney wrote defendant a letter in which he stated that the bank had informed him that defendant was demanding that plaintiff "release" her trust deed, and he stated further that defendant knew plaintiff was entitled to a one-third interest in the property over and above the sum of $20,000, and that defendant should execute a deed or other instrument setting up such interest in her favor. He also stated therein that plaintiff would purchase defendant's two-thirds interest in the property for $6,000, or sell defendant her one-third interest for $3,000. Defendant thereupon filed an action to compel plaintiff to accept payment of the note, and, after summons and complaint had been served on plaintiff in that action, she accepted payment of the amount of the note ($8,000) and interest thereon. About two months later, plaintiff commenced the present action. She alleged, in paragraph VIII of her second amended complaint, that, in the negotiations for the purchase of the property, plaintiff received the advice of defendant and Reuter and relied and acted thereon; that before her offer to purchase the property was "consummated," plaintiff stated to defendant and Reuter that she was a widow with six minor children, that she had little or no income for their support, was not experienced in the care and operation of an apartment house, and by reason thereof she thought she should not complete the purchase of said property; that thereupon defendant and Reuter orally proposed that she should complete the purchase of the property for the sum of $20,000 and they would arrange to borrow the sum of $12,000 to be "evidenced by the promissory note of plaintiff" and to be secured by a first trust deed on said property, and the balance of $8,000 to be paid by plaintiff; that they proposed, upon plaintiff acquiring title, the property should be owned by defendant, Reuter and plaintiff as joint adventurers; that for the purposes of operating and managing the property, plaintiff should convey the same without consideration to defendant and Reuter, to be held by them in trust for plaintiff, defendant and Reuter, and they would execute and deliver to plaintiff a promissory note for $8,000, "the amount of money she would advance in acquiring said property, to be secured by a second deed of trust thereon"; that they would continue to operate the property for a period of two years, and at the expiration of said two-year period they would liquidate said property by selling the same for the best price obtainable, and with the proceeds therefrom they would pay said $12,000 first trust deed obligation and the $8,000 second trust deed obligation, or any balance that might remain unpaid at that time; that all proceeds from the operation and sale of the property then remaining, after payment of expenses, should be divided three ways, that is, one-third to plaintiff, one-third to defendant and one-third to Reuter.

Mr. Reuter, called as a witness by plaintiff, testified that he had advised plaintiff in various matters over the years, had sold property to her and had business transactions with her right along; during his association with defendant, they "went in fifty-fifty" on the deals they made, and worked on every deal together; he had a conversation with plaintiff relative to her statement that she wanted to withdraw from the transaction; he then went to defendant and related the conversation which he had had with plaintiff, and stated to defendant that they (witness and defendant) were taking the deal over; and *at that time* he stated to defendant that they would give plaintiff "a third interest in the profits that we make on this property," and defendant said that was "O.K." He also testified that he told plaintiff and defendant that the plaintiff would "have a third interest in the property, and defendant said that is all right"; nothing was mentioned about sharing in the losses—that they didn't need to do that, prices were going up, and "things looked so rosy" that they didn't mention losses at all; he and defendant were not going to put any of their "own money in it"; when he and defendant "went into the deal of buying" the property they "were to put it up for sale right away," and they did put it up for sale; they raised the selling price to $25,000; thereafter they raised the price to $27,500, and to $37,500; he thought the last price was a little high, and because the proposed sale kept dragging along, he asked defendant how much he would give him for the property; defendant said he would give $1500, and he (witness) accepted that amount; during the time he and defendant operated the apartment house, neither one took a penny out of the income.

Plaintiff testified that she heard the testimony of Mr. Reuter and that she understood the deal to be as he had testified; after she had "signed up to buy the property," she decided it was a little more than she could handle and also take care of her family; she had never received an accounting from either Mr. Reuter or defendant covering the property; she saw Mr. Reuter several times after he and defendant took possession of the property but she did not ask him for an accounting because she had "no reason to"; she had confidence in Mr. Reuter and believed and relied on anything he told her; the last time she was at the property was when she purchased it; the statement prepared by Mr. Reuter and signed by defendant was made without her knowledge, and she had never seen it; it is her "desire to take over" one-half the interest which defendant acquired from Mr. Reuter in the property, and she is willing to pay $750 for it (one-half of the sum paid by defendant).

Defendant testified that Reuter told him that plaintiff wanted them to take the property off her hands; and that he (defendant) was not "very agreeable" at first because they (Reuter and defendant) would lose the commission. He also testified that plaintiff, in his presence, told Reuter that she would lend him the money to buy the property if he would take it off her hands, and Reuter asked defendant if that was all right and defendant said "yes"; about two weeks later, while he (defendant), Reuter and the plaintiff were talking, Reuter said, "[I]f we sell the property and make a profit, I will tell you what we'll do, we'll give you [plaintiff] one-third of the profits over $20,000"; there was no time limit set in which to sell the property and nothing more was said about it.

The court found that the allegations in paragraph VIII (above referred to) of the second amended complaint were true. The judgment was as follows: That plaintiff and defendant are the owners of said real property, together with the improvements thereon, consisting of an apartment house and furniture therein, "each owning an undivided one-half interest" in said property, "subject to an indebtedness due defendant William G. Provines in the sum of $8,000.-00," and also subject to the balance of the indebtedness due on the note which was secured by the first trust deed; that defendant pay to plaintiff the sum of $2,396.77, which is one-half the money defendant has in his possession from the operation of the property up to June 30, 1949; that defendant make an accounting to plaintiff each month after June 30, 1949, during the time defendant is in possession of said property, and pay plaintiff one-half the net proceeds from such operation; that defendant pay plaintiff $250, which is one-half the commission defendant received (as a real estate broker) for making the sale of the property; that plaintiff pay defendant $750 to reimburse him for one-half the amount that defendant paid John E. Reuter (for his interest in the property); that said property shall be sold, and from the proceeds of the sale the balance due on the $12,000 incumbrance shall be paid, and also from those proceeds the $8,000 due defendant shall be paid, and that one-half of any balance then remaining from the sale shall be paid to plaintiff and one-half of such balance shall be paid to defendant; that a receiver be and is appointed to take possession of the property and to sell it as one unit and as a going business.

[1, 2] As above stated, appellant contends that the trial court erred in finding that plaintiff and defendant were joint adventurers and owners of said real property. He argues that there was no evidence that plaintiff undertook the risks of a joint adventurer, and that all the facts and circumstances in the present case negative any suggestion that the plaintiff intended to share in possible losses from the ownership and operation of the apartment house. At the time of entering into the transaction herein there was no discussion relative to losses, and the evidence shows that the possibility of sustaining a loss was not within the contemplation of the parties at that time. As above shown, Reuter testified that prices were going up and "things looked so rosy" that they didn't mention losses at all. A provision to share losses, however, may be implied in a joint adventure agreement. It was stated in the case of Martter v. Byers, 75 Cal.App.2d 375, at page 383, 171 P.2d. 701 at page 105: "[I]f the facts sustain the finding that a joint venture relationship was created, 'The omission of a provision for the sharing of losses in a joint adventure is immaterial because the law supplies that provision. In the absence of agreement, losses by the parties are shared in the same proportion as profits are to be divided.'" See also Parker v. Trefry, 58 Cal.App.2d 69, 75, 136 P.2d 55; Arnold v. Humphreys, 138 Cal.App. 637, 643, 33 P.2d 67.

[3, 4] Appellant states further that all the other elements essential to a joint adventure are lacking. His arguments seem to be based on the theory that there was no agreement between the parties except as disclosed by their escrow agreement and by the statement signed by defendant at the time he purchased Reuter's interest in the property (which statement, hereinabove partially set forth, was received in evidence as "Exhibit A"). After plaintiff decided not to purchase the property, she entered into an oral agreement with defendant and Reuter. In determining whether a joint adventure was created, the court was entitled to consider not only the spoken words of the parties but also their acts. Replogle v. Ray, 48 Cal.App.2d 291, 296, 119 P.2d 980; see also Milton Kauffman, Inc., v. Superior Court, 94 Cal.App.2d 8, 17, 210 P.2d 88. As stated above, after entering into the oral agreement, plaintiff deposited $7500 in escrow, executed her promissory note for $12,000, executed a trust deed upon the property to secure that amount, and accepted a deed to the property. Also, pursuant to said oral agreement, she entered into another escrow wherein she conveyed

to Reuter and defendant her title to the property. She accepted their note for the $8,000 which she had paid on the purchase price of the property and, as security therefor, she accepted a trust deed which was subject to a trust deed given to secure the payment of the $12,000 note. The $8,000 note was not paid on the date it became due (April 1, 1946), and the date of payment was not extended. Plaintiff did not try to collect the note, and apparently the matter of the note was not mentioned until about August, 1948, when defendant notified plaintiff that he had the money ready to pay the note. The property was purchased for the purpose of selling it and obtaining a profit. Exhibit "A" shows that defendant had agreed that plaintiff should share in the net profit of the sale profit. According to Reuter's testimony, the property was owned by the parties jointly and they were to share in the profits equally. Under such circumstances, the court could find that a lender and borrower relationship did not exist. It was said in the case of Martter v. Byers, supra, 75 Cal.App.2d 375, at page 384, 171 P.2d 101 at page 106, that the courts "'have not yet laid down any very certain or satisfactory definition of a joint adventure, nor have they established any very fixed or certain boundaries thereof, but in most cases, they have been content to determine merely whether the given or conceded facts in the particular case constituted the relationship of joint adventurers.' [Citation.] 'A joint adventure may be defined to be a joint association of persons in a common enterprise for profit, but falling short of a partnership.' * * * It appears that the terms of the agreement and the acts of the parties as restricted to the particular projects engaged in, primarily determine whether the undertaking is a joint venture. Facts showing the joining of funds, property or labor in a common purpose to attain a result for the benefit of the parties in which each has a right in some measure to direct the conduct of the other through a fiduciary relation that must exist, will justify a finding that a joint venture exists." The evidence was sufficient to support the finding that the parties were joint adventurers.

Appellant asserts that the case of Mulligan v. Wilson, 94 Cal.App.2d 286, 210 P.2d 526, wherein the court held that a joint adventure was not created, is determinative of the present case. He states that paragraph three of the written agreement therein is similar to "Exhibit A" in the present case. That exhibit was not an agreement between the parties herein. It was a statement signed by defendant, at the time he purchased Reuter's interest in the property, to the effect that at the time the parties entered into the transaction they agreed that plaintiff was to receive one-third of the net profit of the sale profit. It was not signed by plaintiff and was not made with her knowledge. In the Mulligan case the agreement between the parties was in writing and plaintiff's interest was stated to be an interest in the profits and income from the property in excess of the gross investment therein. That case is distinguishable from the present case.

[5] Appellant contends further that there was no consideration for the promise made to plaintiff that she would share in the profits or have an interest in the property, in that, the promise was made to plaintiff subsequent to her agreement to lend the money and after she had entered into the escrow. The record does not disclose the date when plaintiff offered to lend the money, or the date when Reuter made said promise. The record does disclose that after plaintiff had entered into the escrow with the Duffys, she offered to lend Reuter the money, and that thereafter Reuter made the promise. The escrow instructions which were signed by plaintiff and the Duffys were dated January 29, 1945. The escrow instructions which were signed by plaintiff, Reuter and defendant were dated January 30, 1945. The deposit of $7,500 into escrow was made by plaintiff on January 31, 1945. Whether the promise that plaintiff would share in the profits and have an interest in the property was made prior to signing the escrow instructions on January 30th was a question for the trial court to determine from the evidence and the inferences reasonably to be drawn therefrom. Reuter testified that

at the time he told defendant about his conversation with plaintiff, relative to her desire to withdraw from the transaction, that he also told defendant they (defendant and Reuter) were taking the deal over and would give plaintiff "a third interest in the profits that we make on this property." He also testified that he told plaintiff and defendant that plaintiff would have a "third interest in the property." The evidence was sufficient to justify a finding that the promise to plaintiff was made prior to signing the instructions on January 30, 1945, in the escrow with Reuter and defendant.

[6] Appellant contends further that the "alleged agreement" for profits, in addition to the interest on the "loan," renders the agreement usurious. In view of the foregoing conclusions, that the transaction was not a loan but a joint adventure, that contention is not sustainable.

[7] Appellant's contention that the agreement is "within" the statute of frauds is not sustainable. "A joint adventure in the purchase and sale of real estate may be formed by parol agreement". Sly v. Abbott, 89 Cal.App. 209, 216, 264 P. 507, 510.

Appellant also contends that plaintiff's "levy and execution of judgment upon defendant's property is inequitable." He asserts, as an alleged explanation of that statement, that plaintiff obtained a writ of execution before the bond staying execution pending appeal was filed. There is no information in the record regarding a levy of execution, and therefore there is no basis for the contention.

[8, 9] Appellant also contends that the action was upon an oral agreement made more than three years prior to the commencement of this action, and therefore it was barred by laches. In the answer of defendant it was alleged that cause of action "arising from rents, issues and profits" is barred by laches. That allegation was found to be untrue. It does not appear from the pleadings or the evidence that there was any unreasonable delay in commencing the action. Appellant asserts that plaintiff "took no interest" in the property and made no inquiries concerning it until just before commencing the action. Each coadventurer occupies a fiduciary relation to the other. Elsbach v. Mulligan, 58 Cal.App.2d 354, 368, 136 P.2d 651. The evidence shows that plaintiff placed a high degree of trust and confidence in Reuter, and that she believed that he was active in operating the apartment house until a few months prior to commencing this action. It does not appear that she had any reason to believe that defendant would repudiate the agreement. Under the circumstances she was under no duty to make inquiries. The finding regarding laches was supported by the evidence.

[10] Appellant also contends that the action is barred by Section 338, subdivision 4, of the Code of Civil Procedure. That said subdivision provides that an action based upon fraud or mistake must be commenced within three years after "discovery, by the aggrieved party, of the facts constituting the fraud or mistake." As above indicated, it does not appear that plaintiff had any information until a few months before she commenced the action that defendant repudiated the agreement.

[11] Appellant also contends that the action is barred by Section 339, subdivision 1, of the Code of Civil Procedure. That subdivision provides that an action upon a contract not founded upon an instrument in writing must be commenced within two years. Under the circumstances here where, as above stated, plaintiff did not have any information regarding defendant's repudiation of the agreement until a few months before commencing the action, said section is not applicable.

[12] Appellant also contends that plaintiff is estopped to claim a joint adventure, by reason of her acceptance of payment of the $8,000 note. He asserts that when plaintiff was repaid the $8,000, her entire interest in the property was extinguished. Acceptance of that sum by plaintiff did not affect her rights as a joint adventurer. It was the intention of the parties that plaintiff should be repaid the amount she had advanced in order to make the purchase of the property possible. The repayment of the note did not necessarily extinguish her right to an interest in the

property as a joint adventurer. Neither defendant nor Reuter advanced any money toward the purchase price of the property. On the contrary they received $1,000 of the purchase money as commission for making the sale. If the property had been sold, plaintiff would have been entitled to the amount of her note from the proceeds of the sale prior to the determination of profits. Defendant, having paid the sum from his personal funds and not from the income from the apartment house, would be entitled, as ordered by the court, to repayment of that amount from the proceeds of the sale when the property is sold.

Appellant contends further that eight of the findings are insufficient in that they are uncertain, indefinite and ambiguous. The findings so referred to by appellant (Nos. 21, 22, 23, 24, 25, 27, 28 and 30) were made by referring to paragraphs of the answer by number, or to defenses by number, and then stating that all the allegations in those paragraphs or defenses were untrue, except those otherwise found to be true or which defendant by his answer admitted to be true. In order to ascertain the findings which the court made by such references, it is necessary to read not only the allegations of those paragraphs of the answer and the defenses so referred to but also to read the allegations of the second amended complaint referred to in the answer. This method of making findings is a poor substitute for clear and direct findings. Under this method, it is difficult to ascertain the findings which were made. Appellant has not set forth in what respects these findings are insufficient but refers to them generally and by number. It appears, however, from a consideration of the findings as to the allegations of the second amended complaint and as to the allegations of the answer that the findings were sufficient as to the material issues presented by the pleadings.

[13] Appellant contends that it was error to award plaintiff one-half of the amount of the broker's commission received by defendant on the sale from the Duffys to plaintiff. The court found that said commission was paid without the knowledge or consent of plaintiff. As a coadventurer, it was the duty of defendant to disclose such payment to plaintiff. It was proper to require him to account for this secret profit.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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102 Cal.App.2d 353

POPE v. POPE.

Nos. 14297, 14626.

District Court of Appeal, First District,
Division 1, California.
Feb. 19, 1951.

W. K. Pope, also known as W. Kenneth Pope filed an action against Grace Shields Pope for divorce. Defendant filed a cross complaint for separate maintenance and also for divorce. The Superior Court in and for the City and County of San Francisco, Edward P. Murphy, J., entered a judgment granting a divorce to wife and plaintiff appealed from those portions of judgment apportioning the community property and providing support and maintenance for wife. The District Court of Appeal, Bray, J., held that the evidence sustained findings of trial court as to the division of community property of the parties.

Judgments affirmed in part and case remanded with directions.

1. Appeal and error ⚷931(1), 1011(1)

In determining the sufficiency of evidence to support findings as to community property, if there is a conflict in the evidence, District Court of Appeal must accept the evidence and the reasonable inferences therefrom most favorable to trial court's finding.

2. Husband and wife ⚷262(1, 2)

Presumptively all income and property received by the husband after marriage is community property and the burden is on the husband to show that it is his separate property.

3. Husband and wife 🔑272(5)

In divorce action, where trial court in arriving at the amount of community property used an accounting period between 1942 and 1947, husband could not deduct from the amount determined money he received from his mother's estate in 1948.

4. Husband and wife 🔑262(2)

In divorce action, where husband contended that part of community property was the distribution of his mother's estate in the form of jewelry, but husband was unable to show how much jewelry was sold for cash, what it brought, or what became of the proceeds, husband could not deduct claimed amount from computation of total of community property.

5. Appeal and error 🔑996

Where the facts established are such as to reasonably permit opposing inferences to be drawn therefrom and the trial court had adopted one and rejected the other, an appellate court will not disturb the finding.

6. Husband and wife 🔑262(1)

In divorce action, where the monies going into husband's agency account were not identified as husband's separate property, there was no reason why the proceeds of the stock purchased from agency account should be assumed to be husband's separate property.

7. Husband and wife 🔑272(5)

In divorce action, amount expended by husband for maintenance and support, attorneys' fees and costs of wife after the accounting period considered by the trial court in determining the community property could not be considered in arriving at determination of community property of the parties.

8. Husband and wife 🔑272(5)

In determining the amount of community property in a divorce action, the amount expended by husband for use of wife and for household expenses would be deducted from the gross income received by husband.

9. Husband and wife 🔑272(5)

In determining the amount of community property in a divorce action, the amount expended by husband for income taxes during accounting period would be deducted from a total of husband's gross income.

10. Husband and wife 🔑264

In divorce action, evidence sustained findings of trial court that community property of parties was in excess of $150,000.

11. Husband and wife 🔑264

In divorce action, evidence was sufficient to support trial court's finding that husband received stock in lieu of salary and that the value received from the sale of such stock was community property.

12. Evidence 🔑272

In determining the amount of community property in a divorce action, the trial court had the right to take in consideration the amount husband offered wife when the parties separated, since it was an admission that her community property interest was worth that much at least.

13. Husband and wife 🔑264

In divorce action, the evidence clearly established that a home purchased by husband was the community property of husband and wife.

14. Husband and wife 🔑264

In divorce action, evidence sustained finding of trial court that all of the furniture and furnishings of the parties were community property.

15. Divorce 🔑287

In divorce action, where it was impossible to tell from the record whether the trial court meant by its statement in the finding "personal possessions, personal clothing, or other articles of personal adornment" belonging to husband, or if the court meant to include but the very few items which wife admitted belonged to husband, case would have to be remanded to permit the court to determine what this phrase meant and what personal property it intended to accept as the property of husband.

16. Divorce ⚷240(5)

In divorce action, in view of the station of life of wife during her marriage and the fact that over 30 per cent. of alimony would go to payment of income taxes, $2,000 per month alimony was not excessive.

17. Divorce ⚷235

The amount of support the husband must pay his wife in a divorce action is within the discretion of the trial court. Civ.Code, § 139.

18. Divorce ⚷286

Where final divorce decree had been entered incorporating the terms of an interlocutory decree, husband could not complain that trial court improperly awarded wife a certain sum in lieu of her community property by way of an interlocutory decree, since the matter was moot after incorporation in final decree.

19. Divorce ⚷254

In divorce action, where there was a commingling of separate and community funds and husband was unable to definitely trace the source and distribution of all the sums of his separate estate as against his community property trial court's judgment finding that the community property was in excess of a certain value was sufficiently definitive.

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J. W. Lenahan, Burlingame, for appellant.

John D. Costello, M. Mitchell Bourquin, San Francisco, for respondent.

BRAY, Justice.

Consolidated appeals by plaintiff from those portions of both interlocutory and final judgments apportioning the community property and providing support and maintenance for defendant. No appeal is made from the granting of a divorce to defendant.

Questions Presented:

1. The main contention is that the evidence does not support the findings as to community property. 2. Should the judgment have defined the items of community property? 3. Can an interlocutory decree make a present award? 4. Is the alimony excessive?

Record.

Plaintiff filed suit for divorce on the ground of cruelty. Defendant cross-complained for separate maintenance, later amending her cross-complaint to one for divorce on the grounds of cruelty, habitual intemperance and desertion. A strongly contested trial was had. The court made findings hereafter discussed. The interlocutory decree granted defendant a divorce on the grounds of cruelty and habitual intemperance (although the court also had found the allegation of desertion true). It awarded defendant $3,072.12 costs of suit, $2,000 per month alimony terminable only on defendant's death or remarriage, and the sum of $100,000 in lieu of a specific allocation of any community property, $50,000 to be paid forthwith, and gave plaintiff the option of paying the balance in installments. While the appeal from the interlocutory decree was pending, a final decree was entered, incorporating the terms of the interlocutory decree.

Findings.

The court's finding as to the community property and alimony follow: There is community property "of a value in excess of $150,000.00, exclusive of sundry household furniture, equipment and incidentals to the same, including objets d'art, which the Court also finds to be community property." "* * * it will be more consonant with the interests of justice to award" defendant a cash judgment in lieu of apportioning specific shares in the community property; that because of plaintiff's cruelty defendant is entitled to substantially more than half of the community property, and $100,000 will constitute a "just and proper division of the value of any community property, or funds inuring to the credit of the parties * * *." Plaintiff is worth in excess of $1,700,000, consisting of moneys in the bank, real property in San Francisco worth in excess of $500,000, a one-sixth interest in El Dorado County realty of an approximate value of $40,000, a one-third interest in household furniture and equipment in that county of an approximate value of $7000, a one-third interest in other property in that county and in Monterey County, value undisclosed; a beneficial interest in certain trust funds, present value $600,000, stocks, bonds and other securities valued in excess of $547,000, an automobile worth approximately $2000, and other personal property, value undisclosed; "all of the foregoing comprising both his separate property and the community property of" plaintiff and defendant. Plaintiff's total income for the year 1947 was in excess of $90,000, and for the year 1948 will exceed $105,000. During the marriage the parties lived upon a standard of luxury compatible with plaintiff's present wealth. Defendant, fifty years of age, is unskilled in any remunerative occupation, and not possessed of any income, and requires that plaintiff pay her $2000 per month for her support so that she may live in the manner and condition to which she has been accustomed. Sundry household furniture, equipment, and objets d'art are community property and awarded to defendant, excepting certain personal property of plaintiff hereafter mentioned. A method of arbitration is set up in the findings to determine what these items are in the event the parties cannot agree. Improved real property at Palm Springs is the separate property of defendant.

Law Applicable.

[1, 2] In determining the sufficiency of the evidence to support the findings as to community property, certain well established rules of law must be borne in mind: (1) If there is a conflict in the evidence this court must accept the evidence and the reasonable inferences therefrom most favorable to the court's findings. (2) The evidence here shows that all income received by plaintiff from all sources including separate property was commingled and all records thereof were under the control of plaintiff. Presumptively all income and property received by the husband after marriage is community property and the burden is on the husband to show that it is separate property.

General Facts.

The parties were married September 16, 1934, and had one separation for a short period in 1946 when defendant brought a suit for separate maintenance. They were reconciled and lived together until July, 1947. The total period elapsing between marriage and the final separation was almost thirteen years. At all times they lived in the style of wealthy persons. For approximately the first five months of their marriage, they lived at the Cathedral Apartments in San Francisco. They moved to a suite of five rooms in Stanford Court until plaintiff purchased a fourteen room house in Burlingame. In 1942 he was transferred by his employer (Pope & Talbot, Inc.) to Los Angeles where they lived in a four room bungalow of the Beverly Hills Hotel. About five years later they returned to San Francisco and lived at the Mark Hopkins Hotel. There were no children. At the time of trial plaintiff was forty-eight years of age, defendant fifty. Plaintiff's father was wealthy. Plaintiff was employed by his father's firm except for approximately six months when he was required by his employer, because of his drinking, to take a leave of absence. In 1931 he received from his father forty-three shares of Pope Estate Company stock. Part of this stock was resold to Pope, Sr. prior to the marriage. Plaintiff testified that there were simultaneous transfers to plaintiff's brother and sister. However, Satchel, the accountant for Pope, Sr. stated that sixteen shares were given (apparently to the others) at the time the forty-three were transferred to plaintiff. Whether this meant sixteen shares each, or altogether, does not appear. In 1947 plaintiff's accountant destroyed all tax returns for the years prior to 1942. This was after defendant had dismissed her Los Angeles action for separate maintenance in which the question of community property had been raised. The evidence for the years 1934 to 1942, especially the period 1934 to 1937, is extremely sketchy. Plaintiff testified that at the time of marriage (1934) he was employed by Pope Estate Company (the alter ego of his father). Later he said he did not go to work for it until 1937. He gave no testimony concerning his earnings, if any, in the years 1934–5–6 but claims he lost $14,000 in the Pope Sherwin Company of which he says he was a "figurehead." He further claims that his salary was $2400 in 1937, gradually increasing to $16,500 in 1945, dropping to $12,000 in 1946, and to $7,585 in 1947 (he worked only a portion of the year, having been required because of his drinking to take a leave of absence) totalling for the years 1937 through 1947, $95,125. The parties in the years 1942–1947 made split income tax returns, defendant's returns showing income of $6,407.50 in 1942, reaching $8,330 in 1945 and dropping to $3,792.50 in 1947. For the same years plaintiff showed a gross income of $29,524 in 1942, reaching $92,242 in 1947. From 1936–1942 plaintiff paid defendant a monthly allowance of $800, out of which she paid the household bills. While at Beverly Hills he paid her $525 per month and apparently paid the cost of living bills.

The Pope Estate Company was dissolved in 1941 and plaintiff was then employed by Pope & Talbot, of which his brother was president. In 1942 he was vice-president and southwestern manager. The bulk of plaintiff's income from all sources was deposited in a commercial account in his name in the Bank of California. This included money received from earnings, dividends, allowances from his family, trust income, and from sales. The allowances to defendant, the family expenses, personal expenses and moneys for purchase of stocks came out of this account. The deposits and withdrawals and year end balances for the designated years were:

Year	Deposits	Withdrawn	Year end Balance
1942	$62,224	$37,246	$31,648
1943	64,853	66,100	31,246
1944	46,351	67,457	10,120
1945	100,389	65,486	45,022
1946	96,135	117,718	23,439
1947*	62,998	77,788	

(*First eight months)
Total deposits: $432,950

When living at Beverly Hills plaintiff had an account with the Security First National Bank which was opened with a deposit of $400 or $500 and which it was claimed never had a credit balance of over $1000. What moneys were deposited in this account and what the withdrawals were do not appear. An account which plaintiff called the "household account" was opened in the Crocker Bank. The deposits in 1946 were $22,111 and withdrawals $20,507; in 1947, $17,431 and $17,653; total deposits, $39,542. Thus in the years 1942 to 1947 the total deposits in the two banks were $472,492. This computation does not include an account, entitled "personal account," with the Crocker Bank in which the year 1946 plaintiff deposited $40,340.77. Plaintiff failed entirely to explain this account, claiming the bank's record of this account was "false." Nor does it include the sum of $5000 yet remaining in the "agency account" hereafter discussed.

Defendant had no gainful occupation and no earnings, and made no financial contributions to the community.

Plaintiff's testimony as to his salary and other income was unsatisfactory. He stated his salary for 1942 variously as $27,000 and $2700 a month. The records of the employing companies were not produced, nor was any testimony given as to salary except by plaintiff. He did not produce, on request, records of his bank accounts prior to 1941. Plaintiff did not attempt to identify the various in and out items of his bank account, contenting himself, with a few exceptions, with showing the property which came to him from his father and the estates of his father, mother and aunt. The parents were not too friendly toward defendant, except in later years.

Community Property.

While the findings do not show how the court arrived at its determination that the community property is of a value in excess of $150,000, the evidence supports as a reasonable and possible method the following: The total deposits for the period January 1942–August 31, 1947, were $472,492; plaintiff's traceable separate income for that period was $185,966.45; balance creditable to community, $286,525.55. It must be remembered in this behalf that because of the failure of plaintiff to account for the income prior to 1942, all of which was under his control, or to prove the source of the money which purchased the stocks and bonds plaintiff now owns (other than those in his father's companies) the court was entitled to assume that they are community property. The traceable separate income referred to above is comprised of the following items:

1942, 1935 trust	$15,000
1943 " "	15,000
1944 " "	15,000
1945 " "	15,000
1945, Testamentary trust March–December at $1250 per month	12,000
1945, Quarterly dividends August and December on 30,375 shares	8,000
1946, 1935 trust	15,000
Testamentary trust	15,000
Dividends on 60,477 shares	32,000
1947, to August 31: 2/3rds of income for 1946	41,332
	$183,332
1947, Cash distributed final distribution of father's estate	2,634.45
Total credited to September inclusive	$185,966.45

Plaintiff contends that in this computation there are six errors which require certain sums to be credited to separate income and added to the total abovementioned and deducted from the total income. We will consider them seriatim.

[3] 1. Plaintiff received from his mother's estate $25,363. However, as this was not received until 1948, it is not included in the $472,492 income figure and hence should not be deducted.

[4] 2. In a ratable distribution of his mother's estate in 1945 plaintiff received one-third of her jewelry. This third was appraised in the estate at $40,650. Plaintiff contends that this jewelry was sold by the bank and that he was given the cash proceeds therefrom, and that the sum of $40,650 should be added to the separate income. The trouble with this contention is that there is no evidence for what amount the jewelry was sold, and whether any proceeds therefrom actually went into the figure of $472,492. The only testimony on the subject is that of the trust officer of the Crocker Bank who stated that at the time of distribution, "It was lodged with us and it was eventually sold, except one piece we have, a necklace. He took some pieces." He was then asked and testified to its appraised value in the estate, and stated that plaintiff "got the proceeds of the sale in lieu of the jewelry." This is certainly insufficient evidence to show how much jewelry was sold, what it brought, or what became of the proceeds. Plaintiff had it in his power to account for this and failed to do so.

3. From the estate of his aunt who died in 1922, plaintiff received a one-third interest in real property at Van Ness and Pacific. Plaintiff testified that he derives $166 a month income from it (apparently this was at the time of trial in 1948). The only other testimony on the subject is that of the real estate broker, Dempsey, who testified the lease expires in 1951, then having two years plus to run. There is no showing whether plaintiff had received income from this property for any length of time prior to the trial, nor what became of that income, if he had received any,—other than plaintiff's general statement that he put all income in the bank account. In view of plaintiff's failure expressly to show these matters, a reasonable inference could be drawn that the $472,492 did not include very much, if any, of it. On this evidence, to credit, as plaintiff would now have done, his separate income with six years at $2000

per year, would require the court to base such calculation on guesswork.

4. In 1941 plaintiff sold to his father for $32,375, 185 shares of Pope Estate Company, which he claimed was the balance remaining from an original gift, before marriage, from his father of forty-three shares and the stock dividend thereon. It is claimed that on December 3, 1941, this sum went into his commercial account, remaining there until January 28, 1944, when he opened an account in the Bank of California to speculate in securities. He contends that later he sold some of these securities for $3000 over their purchase price of $28,366 and deposited this $31,366 in the commercial account. He contends that both the $32,375 and the $31,366 should be deducted from the commercial account. These two contentions depend primarily upon the question of whether the 185 shares were separate or community property. In 1931, prior to marriage, plaintiff received from his father forty-three shares of Pope Estate Company. In 1932 he sold one share to his father for $2500. In March, 1933, he sold him seven shares, and in November two, all at $2000 per share. In 1935, after marriage, plaintiff received 402 additional shares. In 1935 he sold his father 250 shares, leaving as balance the 185 shares in question. Plaintiff testified that at the time of marriage he was employed by the Pope Estate Company. Later he stated that his father would give him an allowance, and gifts to do a few things he wanted. Defendant testified that plaintiff told her his father had given him many stocks "instead of salary." The other stocks from the father during this period were accounted for, and hence it is a reasonable inference that the original stock given before marriage and the dividend given after marriage, were given in place of salary.

The opposition of plaintiff's parents to the marriage during its early years, the fact that the Pope enterprises were the alter ego of plaintiff's father, the fact that shortly after the marriage the father and mother arranged to sell certain property to the company for an agreed consideration which included distribution of 402.6 shares to plaintiff in addition to the 33 he retained from the 1931 transfer, plus the fact that almost immediately he resold a large part to his father and then the balance to him in 1941, all pursuant to a repurchase plan of the father, plaintiff's statements that in 1935 his father gave him gifts, including stock, in the nature of salary, together with the failure to produce the books of the Pope enterprises, and all the other circumstances of the case, support the trial court's community property findings. A reasonable inference can be drawn that the stock dividend was a device by which plaintiff could be compensated without enhancing the community.

[5, 6] "The rule is well settled that where the facts established are such as to reasonably permit opposing inferences to be drawn therefrom and the trial court has adopted one and rejected the other, an appellate court will not disturb the finding." Baylis v. Baylis, 48 Cal.App.2d 674, 679, 120 P.2d 89, 91. Moreover, the $32,375 is not shown to be within the $472,492. The former sum was deposited in the commercial account on December 3, 1941, which was prior to the period included in the latter figure. Nor is there any evidence that it was included in the figure of $62,224 shown as deposits for the year 1942. Plaintiff testified that he left it in there and did not take it out until he bought securities later. However, the bank account for 1942 fails to support his statement. The situation is very confusing. As pointed out above, the $32,375 was deposited in the commercial account December 3, 1941, but was not there in 1942. The agency account, the one in which plaintiff claims he deposited that sum after withdrawal from his commercial account, actually was not opened until January 28, 1944, and then with plaintiff's personal check for $16,000, a cashier's check payable to plaintiff in the sum of $4000, and the proceeds of a $10,000 U. S. Savings Bond. The evidence supports the conclusion that the $32,375 had nothing to do with the stock purchased from this account. As the moneys going into the agency account have not been identified as plaintiff's separate property, there is no reason

why the proceeds of the stock purchased from that account should be assumed to be separate property.

5. Plaintiff contends that other dividends from the 1935 trust and the testamentary trust mentioned in the foregoing table of credits to separate income, were paid in addition to the sums shown in the table. However, plaintiff points to no evidence of the payment of such dividends, their amounts or their going into plaintiff's bank account. This is a typical example of the position taken by plaintiff in the case. He contends, in effect, that as he was the recipient of separate income, it was incumbent on the defendant to prove that none of the moneys in the commercial account came from this income. Actually the burden was on plaintiff to show that they did come from his separate income, and having failed to do so, neither the trial court nor this court can guess about it. In such event, the presumption of community character must prevail. Plaintiff testified that his interests from these trusts was $30,000 per year, which is the amount shown in the foregoing table. During the trial defendant testified that in 1946 a dinner companion told her that he had received "a terrific check for Pope & Talbot [stock], an extra dividend" and then went on to say that plaintiff must have received such a dividend likewise; that he figured it must be approximately $50,000 and that plaintiff would receive another one in six months, making $100,000 in one year. There is no evidence that plaintiff did receive such dividends. The dividend books of Pope & Talbot were not produced, although plaintiff's brother is the president of that corporation, nor were such items identified anywhere in the bank accounts. This testimony was elicited from defendant in response to her testimony on direct examination to the effect that the only time she had ever asked plaintiff for money was once when she heard he had received $50,000 in dividends. On cross-examination, plaintiff asked about the conversation in which she had heard this, and the foregoing was brought out. Now, plaintiff contends that because of this more or less idle dinner chatter, this court should assume that in 1946 plaintiff received $100,000 in dividends from the Pope & Talbot stock, and that it was deposited in the commercial account, which fails to show any such deposit.

[7] 6. Plaintiff contends that the sum of $134,872 should be deducted from the balance of $286,525.55 for items paid subsequent to July, 1947, for maintenance and support, attorneys' fees and costs of defendant. Included is a sum of $65,300 for separate maintenance, attorneys' fees and costs of plaintiff himself. It is difficult to understand the theory on which this latter item should be considered. However, the entire total cannot be considered as it was expended after the accounting period considered by the trial court. As the income for the subsequent period is not included, the charges for that period should not be included. It appears from the evidence that plaintiff's total income for the year 1947 exceeded $90,000 and for 1948 would exceed $105,000. The tabulations here included only the first eight months of 1947 and none of 1948. The evidence also shows that not all of the 1947 or 1948 income would be separate property. Therefore, it is reasonable to charge these later expenditures to the community income of these later years, rather than to that preceding August, 1947.

[8] The $286,525.55 balance creditable to community hereinbefore mentioned is without any deduction for allowances to defendant (which for a great portion of the marriage was $800 per month), household and personal expenses. Mr. Dupont, assistant secretary of Pope & Talbot, produced a large number of checks which he said were for plaintiff's personal expenses for the years 1942–1947. At least, he had concluded from his examination of them that that is what they were. Plaintiff did not testify concerning them. No detailed explanation of them was given by Dupont. While the checks produced totalled $142,907, among them were checks payable to cash totalling $19,120.93 for which no explanation was offered. The balance left as possible community expenditure is $123,786.07. In using this sum we are assum-

ing, without more evidence than the mere conclusion of Mr. Dupont, who, apparently, from his testimony, determined these questions merely by an inspection of the checks, that all the items in it went for defendant's allowance, household expenses, etc. Deducting this sum, $123,786.07 from the balance of $286,525.55 leaves a net balance of $162,739.48 as income not shown to be separate property and hence must be regarded as community property.

[9, 10] Plaintiff contends that an item of $15,942 for income taxes during the period 1942–1947 should be deducted. Deducting it from the last balance of $162,739.48 leaves $146,797.48, approximately the amount found by the court, and well over the division awarded defendant. The court, of course, had the power to award defendant all of the community property.

$60,000 Loan.

Plaintiff borrowed $60,000 from the Crocker Bank, putting up Pope & Talbot stock as security, depositing it in a special account, withdrawing $53,000 of it the same day to use in a trade with his brother for certain property. None of this money ever went into the commercial account, nor is included in the table used here. Hence, in spite of plaintiff's contention that the $60,000 should be deducted from the $472,492, it is obvious that it should not. Moreover, the loan was paid by checks drawn on the commercial account. What part of the repayment came from community and what part from separate moneys in the commercial account, it is impossible to say. Presumably some of it did, but no allowance for it has been made. It would be included in the court's finding that the community property was "in excess of" $150,000.

Stock in Lieu of Salary.

[11] As pointed out before, there is sufficient evidence to support the court's finding that plaintiff received stock in lieu of salary and that the $32,375 which he received from the sale of stock in 1941 was community property. Adding this sum to the last balance of $146,797.48 equals $179,172.48.

Plaintiff contends now that in arriving at the gross deposits of plaintiff there were duplications in that plaintiff withdrew moneys so as to have a small balance in the bank at the tax period and then later redeposited the same amount. However, no specific amounts were traced in and out this way. When asked concerning specific withdrawals in late February, 1946, and the purpose of their withdrawal, plaintiff said he could not recall. Again, when asked if in each year he removed moneys from the bank between the 25th and 27th of February in each year and made enormous deposits in the first week of March he said, "It was probably done for tax reasons. I *can't recall.*" (Emphasis added.) In view of the uncertainty of plaintiff on this subject and the unreliability of his testimony as to his finances as a whole, it is impossible to determine from the evidence the nature and extent of these redeposits. Plaintiff's evasiveness and lack of recollection of his financial affairs throughout the trial could be explained by the possibility that by no means did all of his income go into the bank accounts which he produced.

[12] In considering plaintiff's claim that there was no community property, the court had the right to take into consideration the fact that when the parties separated in July, 1947, plaintiff offered her the sum of $50,000 cash and $50,000 to be paid in 1960, and $1500 per month support. While plaintiff contended that this was merely an offer of settlement to keep from going to court, the circumstances of the offer were such that an inference could reasonably be drawn from it that it was an admission that her community property interest was worth that much, at least.

As said in Falk v. Falk, 48 Cal.App.2d 762, 767, 120 P.2d 714, 717: "Pursuant to section 164 of the Civil Code, the presumption exists that property acquired by either of the spouses during the marriage is community property, and that this presumption may be rebutted only by satisfactory proof to the contrary. * * * The burden is upon the one who controverts the presumption to prove his claim regarding the character of property acquired during the marriage. Unless that contention is supported by satisfactory proof, the trial court is bound to decide the controversy in accordance with the presumption. * * *

"The commingling of separate property, or the proceeds therefrom, with community property or funds in such a manner as to make it impossible to identify the separate property or to trace the source of the separate funds renders the entire fund or property community in its nature, unless the community funds are inconsiderable in amount. When it is impossible to trace the source of commingled funds, the presumption that all property which is acquired during the marriage is community, will be controlling."

Under the evidence in this case, although the separate property was considerable, still the community funds were not inconsiderable in amount. It is true that the community expenses were high but it is impossible to tell from the evidence in the case that, as contended by plaintiff, they month by month exhausted the community contribution or required contribution from separate resources.

In Grolemund v. Cafferata, 17 Cal.2d 679, at page 683, 111 P.2d 641, 643, the court said: "As to the blending of separate and community property, the general rule is that the confusion of these, so that each is indistinguishable from the other, renders the mass community property for the reason that the separate owner is not able to establish his separate right to any article of the mass, nor prove his right to a computable share of it * * *." The situation in our case is that while plaintiff received certain properties from the estates of his relatives, which properties undoubtedly are his separate property, he blended income therefrom with his salary, both that paid in cash and in stocks, and with other income, the source of which he made no effort to disclose.

"Where the handling of the community funds is entrusted by law to the husband, a certain amount of precaution devolves upon him to keep an approximately accurate account of their disbursements and to keep segregated the community and the separate funds of the parties or to take the legal consequences of being unable to satisfactorily account therefor." White v. White, 26 Cal.App.2d 524, 529, 79 P.2d 759, 762.

"Appellant also claims that neither the separate property of the husband nor wife can be charged with any community rights and that the courts have no jurisdiction to apportion or to set aside to either party any part of the other's separate property. With this respondent has no quarrel, but contends that where appellant has been found to have community property in his possession which he fails or refuses to disclose, a personal judgment against him for one-half of the amount of such community funds is not a division of a separate estate, but merely a division of the community funds which the court has found to be in existence but withheld." White v. White, supra, 26 Cal.App.2d at page 532, 79 P.2d at page 763.

"The burden of producing clear and satisfactory proof that the property was the separate property of decedent was upon the contestant as the respondent was entitled to rely upon the presumption that it was community property." Estate of Duncan, 9 Cal.2d 207, 217, 70 P.2d 174, 179.

Plaintiff's testimony as to his income was unreliable. He seemed to have no definite idea of what his income was, or the value of his properties, and was vague on most of his financial affairs. Many items of income he made no effort to identify. For example, on March 7, 1944, he deposited in the so-called agency account $9620, the proceeds of a sale of a $10,000 United States Bond. No attempt was made to account for the source of that bond. There were many unexplained matters. Thus, the assistant secretary introduced in evidence checks for "personal expenses" totalling in the year 1942 $73,137.80; yet the commercial account for that year shows only $37,246 withdrawn. For the year 1945 plaintiff received $16,500 salary, $15,000 from the 1935 inter vivos trust, $8000 dividends from inherited stock, and possibly received $15,000 from his father's testamentary trust. (It is not clear that he did.) This totals $54,500. Yet that year there was over $76,000 reported as taxable income, and over $100,000 actually deposited in the commercial account. In 1943 his shown income was a possible $29,500. His commercial account shows $64,853. He testified that Satchel was his accountant and had handled his personal books for the past ten years. Satchel, however, testified that he had kept no personal books for plaintiff prior to 1948, and that there never were any books. Satchel was the accountant for plaintiff's father over this period and made out plaintiff's income tax reports. No record of moneys paid plaintiff by any of his father's companies were produced. Although the assistant secretary of the Pope enterprises testified to some of plaintiff's withdrawals from his personal bank account, he was not asked about plaintiff's income. Plaintiff's cancelled checks were kept by the secretary of the assistant secretary of the Pope enterprises. As shown heretofore, the only evidence of the community expenses was that given by the assistant secretary in which he assumed from an examination of certain cancelled checks that they were plaintiff's "personal expenses." No attempt was made to show which were for separate and which for community purposes.

The witness Satchel produced plaintiff's income tax returns for the years 1942–1947. They offer very little light, if any, on the community property question. It is impossible to reconcile the figures in them with the bank accounts. It is also impossible to reconcile the claimed total separate and community income with these returns or with the bank accounts.

Plaintiff contends vigorously that the net community contribution monthly was zero and therefore there never was any community component of the bank account. This contention is based on the assumption that the only community income was the amounts which plaintiff testified that he received as salary. If this were all the community income, obviously the allowance to defendant and the cost of operating the household either at home in their apartment or hotel would wipe it out. But the assumption, as shown herein, is wrong.

Sale of Residence.

[13] In 1935 a home was purchased in Burlingame for $19,500 paid by check on the commercial account. Improvements cost $4500. (Plaintiff first testified they cost $2500 and later changed it to the former figure.) Plaintiff at first testified that the purchase price came from $25,000 for which in 1935 he sold one share of stock to his father. Later he said he sold the stock for $2500. Obviously the purchase price did not come from this source. In 1942 the property was leased to Hearst by a lease signed by *both* plaintiff and defendant. When the home was sold, the deed was executed by both parties as grantors. (Apparently the title company required this, regardless of its status.) Defendant testified that plaintiff often spoke of the house as "our home" and in a discussion concerning its being sold she said, "If we do sell it, let's put the money in the bank and buy another home," to which plaintiff agreed. The instructions to the title company were that the sale price should be paid to both parties. Check in the sum of $20,021.15 in payment of the house was deposited in the Wells Fargo Bank to the credit of both parties. With interest, that deposit now amounts to around $23,000. The foregoing resume of the evidence concerning the house is a substantial basis for holding that the house was community property. See Turknette v. Turknette, 100 Cal.App.2d 271, 223 P.2d 495. The $23,000 should be added to the last balance of $179,172.48, making a new balance of $202,172.48.

Furniture. (Fire Loss.)

Defendant testified that before marriage she had furniture for five rooms at the Stanford Court Apartments and "a great deal" stored, all valued around $12,000. After marriage this furniture was used by the parties, was added to by other furniture which defendant claims to have paid for from sale of her jewelry. Defendant sold some of the furniture and replaced it from the proceeds of sale.

It is impossible to determine from the evidence to what extent plaintiff contributed to the acquisitions to the furniture either directly or by way of gifts to him or to both parties from his parents. When they moved from Burlingame to Los Angeles the furniture was stored. In late 1948 a fire occurred in the storage warehouse. The loss has been valued at $11,105.29, and a check for that is being held by the insurance company to await the outcome of this action.

[14] While the court made no specific finding concerning this $11,105.29, it did find that all of the furniture and furnishings (except certain items which will be later discussed) were community property. The evidence supports such a conclusion. The proceeds of the burned furniture are in the same category. Adding this $11,105.29 to the last balance of $202,172.48 makes $213,277.77 as the minimum total of community property. From this total should be deducted $16,000 which represents the redeposit in the commercial account of funds drawn therefrom for the agency account. This leaves a balance of $197,277.77.

The $32,375 received from sale of stock, which stock was in lieu of salary, was deposited in the commercial account in December, 1941. It was received so close to the accounting period which because of plaintiff's failure to produce the records starts January 1, 1942, as to be reasonably chargeable to that period. However, it might be claimed that it should be credited as against expenditures of 1941 instead. If this were done, and the sum were deducted from the minimum total of community property last mentioned, the balance would still be in excess of the $150,000 which the court found.

Furniture, etc. (Plaintiff's Property.)

[15] The court found: "There is sundry household furniture, equipment and incidentals to the same, including objets d'art, which the Court concludes is the community property of the parties to this action, and the Court awards all of the same to Grace S. Pope, save and except such items as may be determined to be personal possessions, personal clothing, or articles of personal adornment belonging to W. K. Pope * * *." It then appointed the attorneys for the respective parties to determine the articles belonging to plaintiff in the event that the parties could not agree. At argument we requested that counsel try to agree on what the items belonging to plaintiff were. They have been unable to do so. Defendant conceded at the trial that certain items belonged to plaintiff. Plaintiff introduced in evidence, (plaintiff's exhibit 27) a list of items consisting of seven pages on which he had written "mother" or "father," "sister" or "brother" as their source and which he claimed were given to him and which he, in turn, had never given to defendant. It is impossible to tell from the record whether the court meant by its statement in the finding "personal possessions, personal clothing, or articles of personal adornment belonging to" plaintiff any of these items, or if the court meant to include any but the very few items which defendant admitted belonged to him. In the interlocutory decree the court did not insert the arbitration clause or the exception of any items for plaintiff. It awarded to her all the personal property "presently in her possession." The case will have to be remanded to permit the court to determine what this phrase meant and what personal property it intended to except as the property of plaintiff.

Alimony.

[16] Plaintiff complains of the $2000 per month alimony. His main charge against it is that in 1948 while living separately at the Beverly Hills Hotel defendant's bills ran only about $544 for board and room. This, of course, only included her hotel bills, but none of the other expenses of a woman who for more than twelve years of married life had been accustomed to live in high luxury. She testified that at the time of her marriage she was living in the Stanford Court Apartments and was worth the sum of $44,900, including moneys, automobile, stocks and bonds, and jewelry, and that she had an income of $400 per month. At the time of the decree she was in poor health. All

she had left was about $5000 in the bank, no automobile, jewelry worth $20,000, and an equity in a small house in Palm Springs purchased with money borrowed from her daughter. The court found that she is fifty years of age, unskilled in any remunerative occupation, without income, and that $2000 was reasonably necessary to enable her to live in the manner and condition to which she has become accustomed. The evidence shows that during the separate maintenance action and during the pendency of this action plaintiff consented to paying her $1500 per month support. Having in mind that approximately 30% of the alimony will go to payment of income taxes, we cannot say that the court abused its discretion.

[17] Section 139 of the Civil Code provides that the court may compel the husband to make "suitable allowance" for the wife, "having regard to the circumstances of the parties respectively * * *." Such suitable allowance is a matter for the determination of the court, having in mind those circumstances. Barham v. Barham, 33 Cal.2d 416, 202 P.2d 289. "A woman past middle age can seldom rehabilitate herself after a break in marriage relations and the courts may properly safeguard her financial future where the marriage is dissolved for the offense of the husband." Arnold v. Arnold, 76 Cal.App.2d 877, 886, 174 P.2d 674, 678. The amount of support the husband must pay is within the discretion of the trial court. Bowman v. Bowman, 29 Cal.2d 808, 178 P.2d 751, 170 A.L.R. 246.

Interlocutory Decree.

[18] The interlocutory decree awarded defendant in lieu of her community property interest $100,000, $50,000 of which was to be paid forthwith as of the date of the entry of the decree. Plaintiff contends it was prejudicial error "to make a present and absolute disposition in the interlocutory" decree. Wilson v. Wilson, 76 Cal.App.2d 119, 132, 172 P.2d 568, 576. Assuming this to be true, the matter is entirely moot. The payment was not made, the final decree has been entered incorporating the terms of the interlocutory decree. It cannot be contended that in the *final* decree the court had no power to make a present and absolute disposition.

In Wilson v. Wilson, supra, the court discussed the problem under California law of an apparently present award in the interlocutory decree. It indicated that it might be proper to hold that an interlocutory decree may make a present disposition of community property, "but that the title thus conveyed is limited and conditional until the entry of the final decree." 76 Cal.App.2d at page 132, 172 P.2d at page 576. However, it solved the problem by striking from the decree all words presently disposing of the community property and inserting words to the effect that the final decree would dispose of it as set forth in the interlocutory decree.

Judgment Not Definitive.

[19] Plaintiff contends that the court had no power to find that the community property was in excess of a certain value, but should have found the particular items which constituted the community property and that value. The court found that "moneys in bank, real property * * * trust funds * * * stocks, bonds, and other securities * * * and other personal property * * * all of the foregoing comprising both his separate property and the community property * * *." In view of the commingling of separate and community funds that occurred in this case, the decree was sufficiently definitive. As pointed out before, more than $197,277.77 was shown chargeable to community income, and not accounted for by expenditures shown to have been made on behalf of the community. That the courts in the dividing community property may make money awards in lieu of specific property is well established. See Webster v. Webster, 216 Cal. 485, 14 P.2d 522. That the court need only find the value of the community property without specifying the items where it is making a money award in lieu of specific property appears from the decision in Bailey v. Bailey, 60 Cal.App.2d 291, 140 P.2d 693. In Meyer v.

Meyer, 184 Cal. 687, 195 P. 387, the court even required the husband to give a mortgage on the community property in Washington for the amount it awarded the wife. In the Bailey case the trial court had made what amounted to an in lieu money award. However, it failed to specify the value of the community property, and so the appellate court was unable to determine whether the award was equitable. The court said, 60 Cal.App.2d at page 296, 140 P.2d at page 696: "In the case at bar the trial court has failed to make any findings as to the nature and extent of the community property interest. This defect might be remedied by the appellate court, except for the fact as already indicated, that the evidence is not sufficient upon which to make a finding as to the value of the community property interest of the parties. Without first having ascertained the value of the community property interest involved, it would be impossible, under the circumstances of this case, to make any just or equitable award as to division of the property or compensation in lieu thereof. * * * Under the circumstances here presented, the trial court must be held to have abused its discretion in attempting to make an award of money in lieu of a division of property in kind, without first having found the value of the community property interest." In our case the court found the value of the community interest.

In Crouch v. Crouch, 63 Cal.App.2d 747, at page 755, 147 P.2d 678, at page 681, the trial court found that "the exact amount and extent of the community property of the parties and the value thereof has not been accurately established herein" and that $2500 was a fair amount to be paid the wife in lieu of her community interest. In spite of the indefiniteness of the finding the court upheld the award as a proper exercise of legal discretion.

In Washington v. Washington, 91 Cal.App.2d 182, 204 P.2d 386, the court apparently only found what was the separate property of the wife. It then ordered that she pay the husband $500 as "his share of any community property that may have been accumulated by the parties." 91 Cal.App.2d at page 183, 204 P.2d at page 386. The award was upheld.

"Under various circumstances, an award of money to the wife in lieu of her interest in the real and personal property of the community has been sustained." Johnston v. Johnston, 33 Cal.App.2d 90, 92, 91 P.2d 142.

Makzoume v. Makzoume, 50 Cal.App.2d 229, 123 P.2d 72, cited by plaintiff, and Kosloff v. Kosloff, 67 Cal.App.2d 374, 154 P.2d 431, are not in point. There, there were property settlement agreements, which the lower court had failed to approve or disapprove. Nor is Solomon v. Redona, 52 Cal.App. 300, 198 P. 643, which was an action for partition. In Fox v. Fox, 18 Cal.2d 645, 117 P.2d 325, and Beaulac v. Beaulac, 84 Cal.App.2d 649, 191 P.2d 478, the court held that the court could not assign the separate property of one of the spouses to the other, nor require one to pay to the other any amount in lieu of a division of that separate property. The court in our case has not attempted to do that. In Reid v. Reid, 112 Cal. 274, 44 P. 564, 565, the case was not remanded, as claimed by plaintiff here, because the trial court found that certain property was community property "except twelve hundred dollars' *worth,*" but because of other reasons not relevant here. Rozzi v. Rozzi, 86 Cal.App.2d 535, 195 P.2d 464, also is not in point, as the court there was merely discussing the failure of the trial court to place a value on the property awarded the husband. While it remanded the case for other purposes, it refused to set aside the award to the husband.

The judgments are affirmed except as to the award to defendant of that portion of "all of the personal property presently in her possession" intended to be awarded plaintiff, and the case is remanded for the trial court to determine what "personal possessions, personal clothing or articles of personal adornment" should be awarded plaintiff. Costs are awarded defendant.

PETERS, P.J., and FRED B. WOOD, J., concur.

BARSIC v. BARSIC

Civ. 18102.

District Court of Appeal, Second District, Division 2, California.

March 6, 1951.

Action by Cecelia V. Barsic for separate maintenance upon ground of extreme cruelty, against Jacob A. Barsic, who filed cross-complaint for divorce on ground of extreme cruelty. The Superior Court, Los Angeles County, Walter R. Evans, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, McComb, J., held that evidence was sufficient and substantial to support findings of the trial court.

Judgment affirmed.

1. Husband and wife 🔑297

In action by wife for separate maintenance upon ground of extreme cruelty, evidence was sufficient to support trial court's findings for wife.

2. Husband and wife 🔑297

In action for separate maintenance, corroboration of plaintiff's testimony is unnecessary.

3. Husband and wife 🔑300

In action by wife for separate maintenance upon ground of extreme cruelty, whether wife condoned husband's acts of cruelty was for trial court.

Louis F. Labarere and John A. Cronin, Los Angeles, for appellant.

Ernest L. Messner, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff upon a complaint for separate maintenance upon the ground of extreme cruelty, and against defendant on his cross-complaint for a divorce also on the ground of extreme cruelty, defendant appeals.

The sole question is:

Was there substantial evidence to sustain the trial court's findings that defendant was guilty of acts of extreme cruelty toward plaintiff?

Yes. Defendant concedes that plaintiff testified in conformity with the allegations in her complaint that (1) in August, 1944, defendant struck and choked her; (2) in July, 1948, without provocation defendant struck the minor child of the parties with a hammer; and (3) in August, 1948, defendant again struck plaintiff.

[1, 2] Such evidence was sufficient and substantial to support the trial court's findings in accordance therewith. It is to be noted that in an action for separate maintenance corroboration of plaintiff's testimony is unnecessary. (Mattson v. Mattson, 181 Cal. 44, 47, 183 P. 443.)

[3] Likewise it was for the trial court to determine from the conflicting evidence whether plaintiff had condoned the acts of cruelty of defendant. (Cf. Farmer v. Farmer, 79 Cal.App.2d 536, 537, 180 P.2d 55.)

Affirmed.

MOORE, P. J., and WILSON, J., concur.

SUMRALL et al. v. BUTLER et al.

SLINGSBY v. BUTLER et al.

Civ. 7839, 7840.

District Court of Appeal, Third District. California.

Feb. 27, 1951.

Actions by Peggy Joann Sumrall, a minor by and through M. T. Sumrall, the guardian of her estate and person, M. T. Sumrall, and Janis Slingsby, a minor, by and through her general guardian, Catherine Weiss, against George S. Butler, doing business as Butler Freight Service, and another, to recover damages suffered by minor plaintiffs through death of their mother in automobile accident and also to recover for personal injuries suffered by the plaintiff Peggy Joann Sumrall in the accident, consolidated with an action by Janis Slingsby, a minor, by and through her general guardian, Catherine Weiss, against same defendants, to recover for wrongful death of her father in the same accident. The Superior Court, Humboldt County, Delos A. Mace, J., entered judgments in favor of the plaintiffs and the defendants appealed. The District Court of Appeals, Van Dyke, J., held that defendants' admission of liability and that the collision was of great force and violence rendered evidence as to facts and circumstances surrounding the accident inadmissible upon issue of damages in the death actions, but did not render such evidence inadmissible in proof of injuries in the personal injury action, and, hence, trial court properly received the evidence and instructed jury that they were to consider the evidence only in connection with the personal injury action.

Judgments affirmed.

1. Pleading ⊂⇒1

One of the functions of pleadings is to limit the issues and narrow the proof.

2. Pleading ⊂⇒376

If facts alleged in complaint are not controverted by answer, they are not in issue, and no evidence may be offered to prove their existence.

3. Evidence ⊂⇒143

Evidence which is not pertinent to issues raised by pleading is immaterial, and it is error to allow the introduction of such evidence.

4. Pleading ⊂⇒376

If an issue has been removed by an admission in the answer, it is error to receive evidence which is material solely to the excluded matter.

5. Damages ⊂⇒158(1)

An admission of liability will not preclude plaintiff from showing how accident happened if such evidence is material to issue of damages.

6. Damages ⊂⇒158(1)

In action for personal injuries, where liability is admitted and only issue to be tried is amount of damages, the force of the impact and circumstances surrounding accident may be relevant to indicate extent of plaintiff's injuries.

7. Death ⊂⇒86(1), 87, 88

In action for wrongful death of parents, the damages consisted of pecuniary loss suffered by minor children in being deprived of services, earnings, society, comfort and protection of their parents.

8. Death ⊂⇒60

In wrongful death action, where liability is not an issue, force of impact in collision causing the death and matters tending to show liability are not material and admission of testimony concerning them would be error.

9. Damages ⊂⇒158(1)

In action for injuries sustained by eleven year old child as result of collision of automobile in which child was riding with defendant's tractor and trailer, defendants' admission of liability and that collision was one of great force and violence did not render immaterial and inadmissible other features of the accident which might be relevant and material to indicate extent of plaintiff's injuries.

10. Damages ⊂⇒158(1)
Death ⊂⇒57
Trial ⊂⇒207

In consolidated actions arising out of collision between automobile and tractor trailer unit for wrongful deaths of driver and his wife and for personal injuries of eleven year old daughter of wife by prior marriage, defendants' admission of liability and that collision was of great force and violence rendered evidence as to facts and circumstances surrounding the accident inadmissible upon issue of damages in death actions, but did not render such evidence inadmissible in proof of child's injuries, and hence, trial court properly received the evidence and instructed jury that they were to consider the evidence only in proof of child's injuries.

11. Trial ⊂⇒296(11)

In consolidated wrongful death actions, instruction concerning matters jury were to consider in fixing damages, though tending to overemphasize the life spans indicated in mortality tables, was not prejudicially erroneous when instructions on subject were considered as a whole.

12. Appeal and error ⇨1004(1)

Unless reviewing court can say that award made by a jury is so grossly disproportionate to sums reasonably warranted by the facts as to shock the sense of justice and raise presumption that they are the result of passion and prejudice the award must stand.

13. Appeal and error ⇨1004(1)

On appeal, decision of trial court on subject on amount of damages in both personal injury and wrongful death actions cannot be set aside unless verdict is so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on part of jury.

14. Damages ⇨130(1)

Award of $1,500, as reduced to $1,000 by trial court, for injuries to eleven year old girl in automobile accident, including cut on chin, pain in abdomen and in right knee and severe shock, and requiring five days' hospitalization, was not excessive.

15. Death ⇨99(4)

Award of $45,000, as reduced to $40,000, in favor of eleven year old child and six year old child for wrongful death of their mother, who had a life expectancy of 36 88/100 years, was not excessive.

16. Death ⇨99(4)

Award of $29,500, as reduced to $25,000, in favor of six year old child for wrongful death of her father, who had a life expectancy of 38 61/100 years, was not excessive.

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Harry W. Falk, Falk & Falk, Eureka, Cooley, Crowley & Gaither, San Francisco, for appellants.

Edward E. Craig, Berkeley, Hoberg & Finger, San Francisco, Burton & Filene, Yreka, for respondents.

VAN DYKE, Justice.

On May 8, 1948, an accident occurred in Humboldt County on Highway 101, between the towns of Arcata and Crescent City, wherein an automobile driven by Melvin D. Slingsby, who was accompanied by his wife, Neva Slingsby, and Peggy Sumrall, her minor daughter by a former marriage was struck by lumber from an overturning unit of a tractor and trailer owned by defendant and appellant George S. Butler. The tractor and trailer were being driven by defendant and appellant Raymond L. Chahon. As a result of that accident Melvin and Neva Slingsby were killed and Peggy Sumrall was injured. Melvin and Neva left surviving them their minor daughter Janis. Neva also left surviving her, Peggy Sumrall.

An action was filed by the minors Peggy and Janis to recover damages suffered by them through the death of their mother, Neva, and in a second count in the complaint in that action Peggy sought damages for the personal injuries suffered by her in the accident. A second action was filed by Janis to recover damages suffered by her from the death of her father, Melvin. Both actions were consolidated for trial. A jury returned the following verdicts: In favor of Peggy and Janis for the death of their mother, $45,000; in favor of Peggy for her personal injuries, $1,500; and in favor of Janis for the loss of her father, $29,500. Judgments were accordingly entered. Motions for new trial were made as to all three awards and the trial court ordered that new trials be granted unless the following remissions of damages should be made: As to the judgment in favor of the two minors for the death of Neva a $5,000 remission; as to the judgment in favor of Peggy for personal injuries a $500 remission; as to the judgment in favor of Janis for the loss of her father a $4,500 remission. Consents were duly filed to such remissions and motions for new trial were denied. Defendants appealed from all three judgments, presenting the appeal upon a consolidated reporter's transcript and consolidated briefs.

At the beginning of the trial the defendants admitted that Chahon was an employee of Butler, acting within the scope of his employment at the time of the accident; that the deaths of Melvin and Neva Slingsby were proximately caused by the negligent operation of the defendant Butler's vehicles; that Peggy Joann Sumrall sustained injuries as a result of the same negligent acts; that the vehicles involved in the accident collided with great force and violence.

The first witness sworn on behalf of plaintiffs was Martin Sumrall, the father of Peggy. He testified as to the injuries suffered by her as he observed them the night of the accident and thereafter. He said when he saw her she was suffering from shock and continued so to suffer for some time; that she vomited several times while in the hospital and since that time had difficulty in sleeping and showed fear of passing trucks when on the highway; that on the night of the accident she complained of pain in her stomach and pain in her right knee; that she had a cut in her chin requiring four stitches, and her knee was swollen, soft and puffy; that she was in the hospital five days. The next witness was Dorothy Vaughan, a nurse at the hospital, who produced the hospital records concerning the injuries Peggy received and the treatment of them. The doctor's diagnosis, as shown by these records, referred to shock, vomiting, the administration of penicillin, and that the child was suffering from a cold; pain in the abdomen was noted. The doctor's notes stated that the injuries were not serious, considering what had happened, and that the abdominal pain had subsided before discharge from the hospital.

The next witness sworn was Lonnie Hill, a traffic officer who had gone to the scene of the accident. He testified, before objection was made, that the bodies of Neva and Melvin Slingsby were in the automobile when he arrived, the death of both having already occurred. He described in detail the tractor, semi-tractor and trailer being driven by Chahon, and stated that it was one of the largest hauling rigs allowable upon the highway. He said the equipment had been loaded with green lumber at the time of the accident; that the accident happened on a curve. He was then asked concerning skid marks made by the truck and at that point counsel for the defendants objected to any further testimony concerning the accident, upon the ground that the foregoing admissions having been made, such testimony was inadmissible. After some discussion, the court ruled that it would admit evidence concerning the details of the accident, but would limit the application of such evidence to the action of Peggy for personal injuries and would instruct the jury that it was not to be considered for any other purpose. The court did so instruct the jury. Subject to the objection, the witness Hill then testified in substance as follows: That he photographed the skid marks he found, which the driver admitted were made by his equipment (the photograph was introduced in evidence); that the marks extended 123 feet; that he photographed marks on the highway which indicated the point of impact between the truck and the automobile (the photograph was admitted in evidence); that he photographed the automobile (the photograph, admitted in evidence, showed the automobile in a ditch with a lot of lumber piled on top); that he took a close-up picture of the car (this photograph was placed in evidence and shows the forward part of the car badly crushed); that the Slingsby car had been knocked back 84 feet from the point of impact; that the trailer units of the truck were overturned with the wheels in the air; that the trailer had been dragged by the tractor 312 feet from the point of impact before coming to a stop. The court instructed the jury that the photographs were in evidence for the purpose of showing the surrounding circumstances at the time of the accident and were to be considered only in the action of Peggy for her personal injuries and not for any other purpose.

[1–8] Appellants contend that the court erred in admitting the testimony of Officer Hill. They point out that at the beginning of the trial they made the admissions, hereinbefore set out; that Mr. Sumrall, the father of Peggy, as the first witness, narrated the injuries sustained by his daughter, which narration was supplemented by the testimony of the next witness, Mrs. Vaughn, the hospital nurse, and that the testimony thus given showed that Peggy had not been seriously injured. From all this they argue that the court erred in admitting over their objection the testimony of Hill and they ask this Court to apply the rules laid down in Fuentes v. Tucker, 31 Cal.2d 1, 187 P.2d 752. The opinion in that case may, so far as pertinent here, be summarized as follows: One of the functions of pleadings is to limit the issues to narrow proof; if the facts alleged in the complaint are not controverted they are not in issue and no evidence need be offered to prove their existence; evidence which is not pertinent to the issues raised by the pleadings is immaterial and it is error to allow the introduction of such evidence; it follows therefore if an issue has been removed from a case that it is error to receive evidence which is material solely to the excluded matter; an admission of liability does not preclude a plaintiff from showing how an accident happened if such evidence is material to the issue of damages; in an action for personal injuries, where liability is admitted and the only issue to be tried is the amount of damage, the force of the impact and the surrounding circumstances may be relevant and material to indicate the extent of plaintiff's injuries; such evidence is admissible because it is relevant and material to an issue remaining in the case; in an action for wrongful death, the damages consist of the pecuniary loss suffered by plaintiffs in being deprived of the services, earnings, society, comfort and protection of deceased, and the manner in which the accident occurred, the force of the impact and the matters tending to show liability could have no bearing on these elements of damage; in a death case, therefore, when liability is not in issue, such matters are not material and admission of testimony concerning them is error.

The case of Fuentes v. Tucker, supra, was one wherein the admissions of liability were contained in the pleadings upon which the cause went to trial. In this case the admissions were made at the beginning of the trial, but in view of the completeness of these admissions we see no reason why the same rules would not be applicable on the death counts, particulary where, as here, the record clearly imports that the admissions were accepted and acted upon by both parties and the court, as withdrawing from the issues to be tried, all matters having to do with liability and as leaving to be tried only the issue of damages suffered by the respondents.

[9] Notwithstanding all this, the presence in the case of the action of Peggy Sumrall for her personal injuries rendered admissible in her case any evidence material to the issue of the damages she suffered, and the admission of liability for these damages did not preclude her from showing how the accident happened if such evidence was material to that issue. Appellants apparently sought to render such evidence immaterial by their admission that the collision between the vehicles involved was one of great force and violence, but this admission, we think, did not accomplish its purpose. One of the elements of damage pleaded by Peggy Sumrall in her cause for personal injuries (and denied by the answers) was that she had suffered great shock, and the admission that the collision was one of great force and violence did not and could not render immaterial and inadmissible other features of the accident which would be pertinent to that element of damage. Peggy was about 11 years old at the time of the accident. She was riding in the back seat of the car being driven by her stepfather. Her mother was in the front seat. Peggy was lying down and may have been sleeping just prior to the collision. Her mother and stepfather were killed, whether instantly or not does not clearly appear, but at least they were apparently, and may have been actually, dead within a few moments after the impact. The front part of the car in which they were riding was badly crushed and the extrication of their bodies was accomplished thereafter with difficulty. While not suffering severe physical injury, Peggy was imprisoned in the back portion of the car and could not be released for some time and then only by breaking out the back window and taking her out through the opening thus made. The probable combined effect upon her of this series of tragic and frightening events was fairly a matter to be placed before the jury in considering the extent of her personal injuries. These matters are not concluded, indeed are scarcely touched upon, by the bald admission that

the impact between the vehicles was one of great force and violence. Evidence of all these matters, therefore, was material and admissible and could not have been excluded without error being committed, in so far as the proof of the extent of Peggy's personal injuries was concerned. In saying this, we are not implying that in this case the issue of damage from shock alone was the only element that rendered this testimony admissible as to the personal injury action. We specifically point it out as one clear example of why the testimony was admissible. It was clearly admissible under the theory we have discussed. It is not necessary to extend the discussion with respect to the other elements of her personal injuries.

[10] Conceding, as we think must be done from the record here, that the facts and circumstances of the accident were inadmissible under the rule laid down in Fuentes v. Tucker, supra, upon the issue of damages in the death actions, still the trial court had no other course open to it than to admit the evidence in proof of Peggy's personal injuries and to instruct the jury as it did that they were to consider the evidence for that purpose alone. It may be said, further, that respondents themselves moved the court that both actions be consolidated for the purpose of trial upon the ground that they grew out of the same transaction, and responsive thereto the court so ordered. No motion was made at any time for a separate trial as to the issues presented by the cause of action for the personal injuries of Peggy Sumrall.

Appellants complain especially in connection with their specification of error in the admission of testimony which we have discussed above that a certain photograph was introduced in evidence during the testimony being given by Officer Hill, which was a close-up picture of the Slingsby car as it came to rest after the collision, with lumber from the overturned trailer piled upon it. Concerning this picture they say that it gruesomely shows at least one of the dead in the vehicle. This picture they say was Exhibit No. 6 for plaintiff. An examination of all the photographs reveals that none shows either of the bodies of the decedents or any part of them.

[11] Respondents complain as to each of the three verdicts that it was excessive and they claim that, to a prejudicial degree, an instruction given by the court was erroneous and contributed to the excess. At respondents' request the trial court gave an instruction concerning the matters the jury were to consider in fixing damages in the death actions. This instruction was taken from the Book of Approved Jury Instructions and is numbered 175b therein. It reads as follows: "In determining pecuniary loss you may consider not only the financial support, if any, which each plaintiff would have received from the decedents, except for his or her death, but also the pecuniary value of the society, comfort, care, protection and right to receive support, if any, which each plaintiff has lost by reason of the death. In weighing these matters you may consider the age of the deceased and of each plaintiff; the physical condition of the deceased and of each plaintiff, as it existed at the time of the death and immediately prior thereto; their respective expectancies of life, as shown by the evidence; the disposition of the deceased, whether it was kindly, affectionate or otherwise; whether or not he or she showed an inclination to contribute to the support of the plaintiffs or any of them; the earning capacity of the deceased, and such other facts shown by the evidence as throw light upon the pecuniary value of the support, society, care, company, and protection which the plaintiffs reasonably might have expected to receive from the decedents, had he or she lived."

At the request of respondents the court further gave the following instruction upon the same general subject matter:

"In actions of this character the damages to be allowed may extend to all the pecuniary benefits which are reasonably expected to be received by the plaintiffs, embracing the period of expectancy of life common to the deceased and of the survivors. I instruct you that the expectancy of life of the deceased Melvin D. Slingsby at the time of his death was 38 and 61 hundredths years, according to the table of mortality. Plaintiff Janice Slingsby, therefore, was entitled to expect the comfort, services, society, protection, support of said deceased for the period of 38 and 61 hundredths years.

"I instruct you that the expectancy of life of the deceased Neva Slingsby at the time of her death was 36 and 88 hundredths years, according to the table of mortality. Plaintiffs Peggy Joanne Sumrall and Janice Slingsby, therefore, were entitled to expect the comfort, services, society, and protection of said deceased for a period of 36 and 88 hundredths years.

"This expectancy is not absolute. In this respect you may take into account all the evidence relating to the health and physical condition of the deceased and of the minor plaintiffs."

Concerning this last instruction appellants say that by it and court invaded the fact-finding province of the jury. They say this portion of the instruction told the jury that the respective respondents had the legal right to the total expectancies of life mentioned in the tables.

There was evidence introduced concerning the condition of health of the decedents at and just prior to death, concerning their habits of living, the nature of their respective occupations and similar evidence, all of which bore upon, and would be properly considered by the jury when estimating, the probable life spans of the two individuals. In addition to this, there had been introduced the tables of mortality which bore upon the same matter. By this instruction the trial court did emphasize the evidence inherent in the tables and called the jury's attention specifically to the probable life spans "according to the table of mortality." It then stated that because a certain span of years appeared in the tables as the probable life span, therefore the respective plaintiffs were "entitled to expect" during that period the benefits of the continuation of the particular life, which benefits they had lost by the wrongful infliction of death. We cannot approve this singling out and emphasizing of the tables, followed by language which was susceptible of interpretation by the jury as taking from them their function of estimating the probable life spans involved from all of the evidence, including the tables. To tell a jury, in effect, that life spans as indicated in the tables of mortality are conclusive would, of course, be error; but we do not think the instruction given, fairly construed, can be so interpreted. Thus the jury were told that the indicated span was taken from the tables of mortality and was in accordance therewith. We think that qualification was intended by the court to apply to the following sentence in which the jury were told that "therefore the plaintiffs were entitled to expect benefits from the continuance of life for that period." In other words, what the court intended to say was that this sentence also was qualified as being in accordance with the same tables. In the closing part of the instruction the court fairly stated that the expectancy of life according to the tables was not absolute and that in this respect the jury must take into account all of the evidence relating to the health and physical condition of the deceased and of the minor plaintiffs. Clearly, the court here referred to the evidence other than the tables which would bear upon the probable span of the lives involved. While we do not, as we have said, approve this form of instruction because of its tendency to overemphasize the life spans indicated in the tables of mortality, yet we do not believe that such error as may be contained in the instruction would be ground for reversal in this case. After all, we are dealing here with a matter which is one of common knowledge and concerning which jurors need little, if any, instruction. They are, of course, to be told that the probable life span of the decedent is one of the variables which they must take into consideration in arriving at the award to be made. Nevertheless, instructions as to what factors are to be considered in determining a probable span of life are addressed to a subject well within their common knowledge and we do not think that the instruction here complained of could have produced injury by way of increasing the awards which would otherwise have been made. As a matter of fact, the evidence in this case concerning the probable length of life of decedents other than the tables was of such a nature that made it altogether likely that these two individuals had a better than average chance to live for the period of time indicated in the tables. They were young, in good health and physical condition, settled into harmonious family relationships and receiving income apparently sufficient for their needs. Had the instruction complained of not been given it is likely that the jury would in any event, these things considered, have believed that these people would probably have lived out the measure of time allotted by the tables as their probable expectancy of life.

[12–16] Finally, appellants assert that the awards were in all three cases excessive. The rule to be applied by an appellate court in determining whether or not an award made by a jury is excessive has been stated many times. Unless the reviewing court can say that the award made by a jury is so grossly disproportionate to sums reasonably warranted by the facts as to shock the sense of justice and raise the presumption that they are the result of passion and prejudice the award must stand. Potter v. Empress Theatre Co., 91 Cal.App.2d 4, 13–14, 204 P.2d 120. " 'The amount of damages in such cases is committed first to the sound discretion of the jury, and next to the discretion of the judge of the trial court, who, in ruling upon the motion for new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just. Upon appeal, the decision of the trial court and jury on the subject cannot be set aside unless the verdict is "so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury." ' " Bisinger v. Sacramento Lodge No. 6, 187 Cal. 578, 585, 203 P. 768, 771. In this case motions for new trial were made and as to each award the trial court ordered that a new trial would be granted unless certain sums were by the respondents remitted from each award. From this, of course, we conclude that the trial judge who heard the evidence, saw the witnesses and experienced the benefit of first-hand contact with the presentation made by each side believed that the reductions which he indicated ought in justice be made, would bring the awards within permissible bounds. He believed the award in favor of Peggy Sumrall should be reduced by one-third; that the award in favor of Janis Slingsby for the loss she suffered from the death of her father ought to be reduced by approximately 16% and that the award in favor of Peggy and Janis for the loss of their mother ought to be reduced by approximately 11%. While, of course, no one can fix damages in such cases as these except by rough approximation, nevertheless the action of the court shows that the trial judge considered each award and his determination of the proper sums as expressed in his order lends support to the final judgments. We think we cannot say from this record that the amounts finally adjudged to be recovered by respondents can meet the tests for reversal by an appellate court. These considerations are strengthened by reference to the testimony which showed, without conflict, these things: Peggy Sumrall was approximately 11 years old when she lost her mother; Janis Slingsby was approximately 6 years old when she lost both her mother and her father; decedent Melvin Slingsby was 29 years old, had been in military service in the last World war, achieved the rank of Lieutenant in the Infantry, was a law-abiding and temperate man, a regular church attendant, and steadily employed. He and his wife were caring for both children in their home. Peggy was taking music lessons and was given singing instruction, and, although not Slingsby's daughter, yet he had commenced proceedings to adopt her. He was highly respected in the community in which he lived. Neva Slingsby, mother of the two children, was a loving and affectionate mother, was rearing her children according to good, accepted standards and giving them her personal care and attention. The family apparently was a happy and congenial one. Children are fortunate to be born into and to be brought up in such a family. While Slingsby's earnings at the time of death were approximately $300 per month, they were apparently sufficient for the demands made upon them, and having in view his exemplary character as shown by the evidence there was reasonable probability that these earnings would not only continue at the rate already achieved, but would increase materially. We hold that the awards were within permissible limits.

The judgments are affirmed.

ADAMS, P. J., and PEEK, J., concur.

102 Cal.App.2d 541

WILLIAMS et al. v. KRUMSIEK et al.

SANDERS et al. v. KRUMSIEK.

Civ. 4066.

District Court of Appeal, Fourth District, California.

Feb. 28, 1951.

Ruel G. Williams and another sued Irene A. Krumsiek, O. A. Sanders and Lola B. Sanders to recover commissions for negotiating a contract for exchange of defendant Krumsiek's ranch and defendants Sanders' motel. Defendants Sanders filed a cross-complaint against defendant Krumsiek for damages caused by her refusal to consummate the contract. From judgments of the Superior Court of Kern County, Norman F. Main, J., for plaintiffs and cross-complainants against defendant Krumsiek, she appealed. The District Court of Appeal, Mussell, J., held that certain amendments endorsed by named plaintiff on the back of defendant Krumsiek's written offer, accepted by defendants Sanders, did not materially change the terms of the offer, and that another such amendment, providing that defendants Sanders' share of plaintiff's commission should be covered by a note payable from ranch crops, was not prejudicial to defendant Krumsiek.

Judgment for plaintiffs against defendant Krumsiek affirmed and judgment on the cross-complaint reversed.

1. Appeal and error 🔑1011(1)

The trial court's fact findings on conflicting evidence will not be disturbed on appeal.

2. Brokers 🔑64(2)

Amendments, endorsed by real estate broker on back of ranch owner's written offer, accepted by motel owners, to exchange ranch for motel, that all hay harvesting on ranch should cease and ranch hand's work be turned to irrigation under motel owners' direction, that title to certain part of ranch should be released when specified sum was paid on trust deed note, and that no personal property should be held under trust deed, given on ranch by motel owners to secure their note to ranch owner, did not materially change terms of offer, and further amendment, providing that motel owners' share of brokers' commission should be covered by note payable to broker from ranch crops, was not prejudicial to ranch owner.

3. Brokers 🔑85(1)

In brokers' action to recover commissions for negotiating unconsummated contract for exchange of defendants' ranch and motel, testimony as to circumstances under which one of plaintiffs made notations of amendments to defendant ranch owner's written offer on back thereof was admissible to show whether parties intended such notations as amendments transforming offer into new proposal or only as requests to ranch owner for consideration when details of transaction were worked out in contemplated escrow agreement.

4. Contracts 🔑169

Where there is apparent ambiguity in written agreement, contemporaneous conversations and circumstances of making of agreement may be considered in ascertaining parties' true intention.

5. Costs 🔑172

In brokers' action for commissions for negotiating unconsummated contract for exchange of defendants' ranch and motel, trial court erred in rendering judgment for attorneys' fees on defendant motel owners' cross-complaint against defendant ranch owner for damages because of expense of defending action, in absence of contractual or statutory authority for allowance of such fees. Code Civ.Proc., § 1021.

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Burum, Young & Wooldridge, Bakersfield, for appellant.

West, Vizzard, Howden & Baker, Bakersfield, for respondents, Ruel G. Williams and E. R. Dickerson.

William R. Hulsy, Bakersfield, for respondents, O. A. Sanders and Lola B. Sanders.

MUSSELL, Justice.

Action for real estate commission and cross-complaint for damages.

Defendant Irene A. Krumsiek and her daughter were the owners of a ranch near Rosamond in Kern County. On May 20, 1948, Mrs. Krumsiek listed her property for sale with plaintiff Ruel G. Williams, a real estate broker. The defendants and cross-complainants O. A. Sanders and Lola B. Sanders owned a motel at Long Beach and during the spring and summer of 1948 plaintiff Williams attempted to negotiate a trade of the Sanders' motel for the Krumsiek ranch. On or about July 1st Mr. and Mrs. Sanders prepared and submitted a written offer to trade properties and this offer was rejected by Mrs. Krumsiek. On July 9th, 1948, Williams prepared a written instrument for and on behalf of Mrs. Krumsiek, which instrument was a deposit receipt form, by the terms of which she offered to exchange the ranch for the motel. The document provided that Mrs. Krumsiek was to assume loans against the motel in the approximate sum of $33,000; the Sanders were to give their note, payable to Mrs. Krumsiek in the sum of $20,000 and this note was to be secured by a deed of trust on the ranch. Sanders and Krumsiek were each to pay $1,500 real estate commission. Mrs. Krumsiek gave Williams her check for $500 and Williams took the instrument to the Sanders for their signature and approval. Mr. and Mrs. Sanders approved the deal as submitted and signed the document. However Williams made certain notations on the back of the document, which notations are as follows:

"Sellers Amendments to offer

"All hay harvesting on Ranch to cease and work of Ranch hand be turned to irrigation under direction of seller until Aug 1st

"Title to south 80 to be released when $6000 has been paid on T. D-note.

"No personal property to be held under T.D.

"Sellers share of Commission to be covered by Note payable to Williams & Dickerson (brokers and payable from 1st Crops of 1949. On or before June 1, 1949."

On the day following the signing of the offer by Sanders and his wife, Williams called upon Mrs. Krumsiek and discussed the "whole matter" with her, including the proposed amendments and told her that Mr. and Mrs. Sanders had accepted her offer. In this connection, Williams testified that Mrs. Krumsiek said "She wasn't at all sure she wanted to go through with it now" and would let him know; that on July 14th he learned for the first time that Mrs. Krumsiek's daughter was part owner of the ranch, when Mrs. Krumsiek "offered it as a reason for not going through with the deal."

On July 16th or 17th Mrs. Krumsiek and her daughter visited the motel property with Williams and after inspecting the premises, Miss Krumsiek informed Williams that she did not want the place.

After Miss Krumsiek refused to go through with the contract, payment was stopped on the $500 check by Mrs. Krumsiek and the instant action was filed by Williams and E. R. Dickerson, brokers, to recover $1,500 commission from Irene Krumsiek, and a like amount from Sanders and his wife. A cross-complaint was filed by Sanders and his wife against Irene Krumsiek, in which it was claimed that the action of Mrs. Krumsiek had prevented the sale of the motel to other parties and that cross-complainants had been damaged in having to bear the expense of defending the action brought by plaintiffs.

The trial court gave judgment for plaintiffs against Mrs. Krumsiek for the sum of $1,500 and denied plaintiffs a judgment against Sanders and his wife. The court also awarded cross-complainants a judgment against Irene Krumsiek for $300 as attorneys' fees for defending the action brought by plaintiffs Williams and Dickerson. Irene Krumsiek has appealed from both judgments.

[1] The principal question for our determination is the effect, if any, of the "amendments" endorsed upon the written offer and agreement signed and submitted by defendant Irene Krumsiek.

At the time the document was signed by Mrs. Krumsiek she was an owner of only an undivided one-half interest in the ranch. She testified at the trial that at the time the offer was signed by her she informed Williams that it was made on condition that the proposal was acceptable to her daughter. This was denied by Williams and the court found against Mrs. Krumsiek on this issue. The appellant concedes that on this point the court was entitled to resolve the conflict in the evidence and that the court's findings on this issue are final and conclusive on this appeal. In this connection, it appears from the answer as an affirmative defense that the offer signed by Irene Krumsiek was conditioned upon the approval of her daughter. No other grounds were alleged or proved in an attempt to avoid the effect of the document executed by defendant Irene Krumsiek. It is claimed that the "amendments" transformed the Krumsiek offer into a "new proposal" and that there was a qualified acceptance of the original offer. However, the trial court resolved the conflict in the evidence in this respect in favor of plaintiffs and its determination will not be here disturbed. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Dillard v. McKnight, 34 Cal. 209, 223, 209 P. 2d 387, 11 A.L.R.2d 835.

Williams, Sanders, and Mrs. Sanders all testified that the first three of the four amendments appearing on the reverse side of the Krumsiek offer were really not amendments at all but only in the nature of requests to be submitted to Mrs. Krumsiek to be considered by her when the details of the transaction were worked out in the contemplated escrow agreement. Sanders and his wife both testified that the offer, as submitted, was accepted by them. There was substantial testimony to support the trial court's finding that the offer of appellant was accepted and that the notations on the back of the written contract were merely requests for a further elaboration or modification of the agreement which was to be worked out in the escrow if appellant was willing to do so. There is also substantial testimony in the record to the effect that appellant did not refuse to consummate the exchange of property because of any counter proposal being made to her.

[2] The first three of the so-called amendments relate to matters which, if incorporated into the agreement, would not materially change the terms of the offer. The fourth "amendment" relates to the manner in which the commission would be paid by Sanders and his wife and was an arrangement by them with plaintiff Williams which in no way prejudiced the appellant.

[3, 4] The court correctly permitted the taking of testimony as to the circumstances under which the notations were made in order to ascertain the true intention of the parties. Isenberg v. Salyer, 62 Cal.App. 2d 938, 145 P.2d 691. Where, as here, there was an apparent ambiguity in the agreement, it was proper to inquire into the contemporaneous conversations and circumstances of the making of the agreement. Meadows v. Emett & Chandler, 86 Cal.App.2d 1, 11, 193 P.2d 785.

[5] It is finally argued that the trial court erroneously rendered a judgment on the cross-complaint for $300 attorneys' fees. This contention must be sustained where, as here, there is no contractual or statutory authority for the allowance of such fee. Viner v. Untrecht, 26 Cal.2d 261, 272, 158 P.2d 3; Code Civ.Proc. § 1021.

The judgment in favor of plaintiffs and against Mrs. Irene Krumsiek is affirmed and the judgment on the cross-complaint is reversed. Plaintiffs to recover costs on appeal against Irene Krumsiek. Appellant Irene Krumsiek to recover her costs on appeal against cross-complainants.

GRIFFIN, Acting P. J., concurs.

SEABOARD FINANCE CO. v. MILES & SONS, Inc., et al.

Civ. 7899.

District Court of Appeal, Third District, California.

Feb. 27, 1951.

Action by Seaboard Finance Company against Miles & Sons, Inc., and others to recover on a check drawn by defendant, payable to plaintiff, payment on which had been stopped after delivery to plaintiff. The Superior Court, Merced County, Gregory P. Maushart, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Adams, P. J., held that check in hands of original payee was subject to defense of lack of consideration and that the evidence sufficiently established that defendant had received no consideration for check drawn as a convenience to defendant's subcontractor in payment of monthly installments due on sub-contractor's indebtedness to plaintiff.

Judgment affirmed.

1. Bills and notes 🔑493(1, 4)

Consideration for a check is inferable from the instrument itself, but such inference or presumption is rebuttable.

2. Bills and notes 🔑493(4)

Presumption of consideration for one of several checks, issued merely as a convenience to drawer's subcontractor in payment of monthly installments due on subcontractor's indebtedness to payee, was sufficiently rebutted by evidence that drawer was not indebted to payee nor obligated to subcontractor to continue to make such payments and had not guaranteed the payments.

3. Bills and notes 🔑327

A "holder in due course" is one who has taken negotiable instrument from original payee for value without notice of any infirmities in instrument or defect in title of the person negotiating it. Civ.Code § 3133(1–4).

See publication Words and Phrases, for other judicial constructions and definitions of "Holder in Due Course".

4. Bills and notes 🔑90

A negotiable instrument in hands of original payee is subject to defense of lack of consideration.

5. Bills and notes 🔑518(1)

In action by payee to recover on a check drawn by defendant, payment of which had been stopped after delivery to plaintiff, evidence sufficiently established that defendant had received no consideration for check issued as a convenience to defendant's subcontractor in payment of monthly installments due on subcontractor's indebtedness to plaintiff and hence was not liable on check.

◆

Bromley, Ritter & Lindersmith, Los Angeles, Ralph Robinson, Fresno, for appellant.

C. Ray Robinson, R. A. McCormick and Margaret A. Flynn, all of Merced, for respondent.

ADAMS, Presiding Justice.

Plaintiff by this action sought to recover on a check drawn by defendant, payable to plaintiff, payment of which was stopped after its delivery to plaintiff. Defendant pleaded by way of answer that there was no consideration for the check.

From the evidence introduced it is inferable that defendant had in its employ one Davies who was employed as a sub-contractor. Davies was indebted to plaintiff, the debt being payable in monthly installments. At the request of Davies, and merely as a convenience to him, for a period of several months defendant sent its checks to plaintiff in payment of the installments due from Davies, each payment being deducted by defendant from the amount due Davies at the end of the month; but at no time did defendant obligate itself to plaintiff or to Davies to do so, nor does it appear that plaintiff even knew of the arrangement. Payment on the contested check was stopped because Davies ceased to be employed by defendant. During the trial the court asked counsel for plaintiff whether, if no check had been written, plaintiff would have had a cause of action against defendant, and the answer was that it would not. Accepting this as an admission that defendant was under no obligation to plaintiff and that the check was given to plaintiff without consideration, judgment was entered for defendant. Plaintiff has appealed, its contention before us being that the check itself implied a consideration, and, also, that it was a holder of the check in due course, and, as such, not subject to the personal defense of lack of consideration. But appellant was the original payee and not one to whom the check had been transferred by the payee; and if appellant's argument were sound it would follow that the drawer of a check, or the promisor of a promissory note, though such check or note had never been negotiated by the payee or promisee and was still held by it, could never avail himself of the defense of lack of consideration. This is not the law.

[1, 2] While it is true that consideration for the check is inferable from the instrument itself, such inference or presumption is rebuttable, and in this case was sufficiently rebutted. There was uncontradicted testimony that the payments made to plaintiff by defendant were made because Davies told defendant that he would like to have it make his payments for him, but that at no time, either orally or in writing, did defendant ever say to any officer of plaintiff that it would guarantee the payments. Defendant was not obligated to Davies to continue to make payments for him even if he continued in its service, which he did not; and plaintiff, knowing nothing of anything which transpired between defendant and Davies, had no reason to expect that defendant would make payments due it from Davies. It is not contended that defendant owed anything to plaintiff, nor was it shown that plaintiff suffered any loss or detriment by reason of the stoppage of payment on the check. For all that appears in this record no payment to plaintiff from Davies may have been due when this action was begun or said check was drawn. At most, the presumption flowing from the written instrument created only a conflict of evidence which the trial court resolved against plaintiff.

As for plaintiff's contention that it was a holder in due course and, as such, not subject to the defense of lack of consideration, such a holder is defined in Civil Code section 3133 as follows:

"A holder in due course is a holder who has taken the instrument under the following conditions:

"(1) That it is complete and regular upon its face;

"(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

"(3) That he took it in good faith *and for value;*

"(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." (Italics added.)

[3, 4] This section, and those immediately following it, are premised upon the proposition that the holder in due course is one who has taken the instrument from the original payee; that he has, without notice of any infirmities therein or defect in the title of the person negotiating it, given value to the person who negotiated it to him. There is nothing in that section that holds or implies that while the instrument is in the hands of the original payee, the latter, in attempting to enforce it, is not subject to the defense of lack of consideration, or that he is more than a mere holder.

[5] The evidence sufficiently establishes that defendant received no consideration for the check, wherefore the judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

102 Cal.App.2d 506

BERTRAM v. ORLANDO et al.

Civ. 14341.

District Court of Appeal, First District,
Division 2, California.
Feb. 27, 1951.

George A. Bertram brought an action against Saverio Orlando, and others, for a mandatory injunction and damages resulting from action of defendant's predecessors in interest to land adjoining plaintiffs' land in setting upon their land buildings set upon concrete piers part of which extended across the common boundary line and occupied a portion of the surface of plaintiff's land. The Superior Court in and for the County of Marin, J. O. Moncur, J., rendered a judgment adverse to defendants and defendants appealed. The District Court of Appeal, Dooling, J., held that the action fell within statute of limitations which bars after three years an action for trespass upon or injury to real property.

Judgment reversed.

See also 220 P.2d 417.

1. Limitation of actions 🔑55(6)

Where a trespass consists of physical entry upon lands of another and taking possession thereof under such circumstances as to indicate intention that trespass shall be permanent, law may regard wrong done as complete at time of entry, and allow recovery in single action of damages resulting therefrom, including prospective as well as past damages, particularly where entry and taking possession are for a public use, in connection with which trespasser might have exercised right of eminent domain, but omitted to do so, and in such case statute of limitations runs from time of original entry. Code Civ. Proc. § 338, subd. 2.

2. Limitation of actions 🔑32(1)

The encroachment of a building obviously intended to be permanent upon soil of another is a permanent trespass and statute of limitations which bars after three years an action for trespass upon or injury to real property is applicable to cause of action based thereon. Code Civ.Proc. § 338, subd. 2.

3. Limitation of actions 🔑32(1)

Where defendant's predecessors in interest to land adjoining plaintiff's land placed upon their land buildings set upon concrete piers part of which extended across common boundary line and occupied a portion of surface of plaintiff's land, such action was a permanent trespass, and statute of limitations which bars after three years an action for trespass upon an injury to real property was applicable to plaintiff's cause of action for a mandatory injunction and damages based thereon. Code Civ.Proc. § 338, subd. 2.

Charles D. Sooy, San Francisco, Fahey Bocci & Gallen, Daly City, for appellants.

L. L. James, Carl E. Day, San Francisco, for respondent.

DOOLING, Justice.

Plaintiff and defendants are the owners of adjoining parcels of land. At least twenty years before the trial of this action defendants' predecessors in interest placed upon their land three wooden buildings set upon concrete piers parts of which extend across the common boundary line and occupy a portion of the surface of plaintiff's land. Plaintiff commenced an action for a mandatory injunction and damages and from a judgment granting plaintiff such relief defendants appeal. The primary question presented on appeal is whether the action falls within the statute of limitations, Code of Civil Procedure, section 338, subdivision 2, which bars after three years: "An action for trespass upon or injury to real property."

Defendants rely upon Rankin v. De Bare, 205 Cal. 639, 271 P. 1050, which we have concluded is controlling. In that case an action was brought to compel the removal from plaintiff's premises of an encroachment of a building belonging to defendant, one wall of which rested upon a strip of plaintiff's land, and for damages. The court said 205 Cal. at page 641, 271 P. at page 1051:

"The record shows that the injury or trespass is permanent in character. Where the injury or trespass is of a permanent nature, all damages, past and prospective, are recoverable in one action, and the entire cause of action accrues when the injury is suffered or the trespass committed. (Citing cases.) The trespass was committed * * * on or about May 1, 1917. Three years expired on May 1, 1920, and as this action was not commenced until January 5, 1923, the cause of action was barred."

Plaintiff relies on Kafka v. Bozio, 191 Cal. 746, 218 P. 753, 29 A.L.R. 833. That was not a case where an adjoining building encroached upon the surface of plaintiff's land, but an encroachment by progessive leaning of the wall of the building above the surface. The court in that case draws the distinction clearly 191 Cal. at pages 750–751, 218 P. at page 755:

[1] "The wrong here complained of was an encroachment, not upon plaintiffs' land, but upon the space above the land, and therefore was not a trespass but a nuisance. The distinction is pointed out in Wood on Nuisances (3d Ed.) at page 33.

"The action herein is not an action at law to recover damages for a trespass, but a suit in equity to abate a nuisance, and, as originally instituted, incidentally to recover damages therefor. Code Civ.Proc. § 731; Meek v. De Latour, 2 Cal.App. 261, 263, 83 P. 300, and cases cited. Where a trespass consists of a physical entry upon the lands of another and taking possession thereof under such circumstances as to indicate an intention that the trespass shall be permanent, the law may regard the wrong done in such case as complete at the time of the entry, and allow recovery in a single action of all damages resulting therefrom, including prospective as well as past damages. This is particularly true where the entry and taking possession are for a public use, in connection with which the trespasser might have exercised the right of eminent domain, but omitted to do so. Robinson v. Southern California Ry. Co., 129 Cal. 8, 61 P. 947; Williams v. Southern Pac. R. Co., 150 Cal. 624, 89 P. 599. In such a case the statute of limitations runs from the time of the original entry."

The trial court found: "That said nuisance is daily and continuous * * *. That said encroachments can be easily removed at a reasonable cost."

Plaintiff cites cases from other jurisdictions and 54 C.J.S., Limitations of Actions, § 169, pp. 131–132, where the rule is announced: "A permanent structure as respects running of the statute of limitations has been defined as one which may not be readily remedied, removed, or abated at a reasonable expense or one of a durable character evidently intended to last indefinitely, costing as much to alter as to build it in the first instance, while, if the structure causing injury can easily be changed or repaired at reasonable expense, it is a temporary structure."

With one exception all of the cases cited in support of the rule are cases of structures wholly on the land of the defendant which caused consequential damage to plaintiff's land as by diversion of water thereon, creating smoke, odors or pollution etc. Even in such cases, although the structure itself does not invade the surface of plaintiff's land, it has been held in those jurisdictions that if it would be unduly costly to change the structure so as to abate the consequential damage the nuisance is permanent and the statute of limitations commences to run with the first injury. These cases are no authority for the rule that a direct invasion of the surface of the soil of another by the encroachment of the foundations of a building thereon is not, to requote Kafka v. Bozio, supra, 191 Cal. at page 750, 218 P. at page 755, "a physical entry upon the lands of another and taking possession thereof under such circumstances as to indicate an intention that the trespass shall be permanent".

The single exception above noted is Pettit v. Incorporated Town of Grand Junction, 119 Iowa 352, 93 N.W. 381. There a town constructed frame buildings upon a public street and the court applied the rule to conclude that it would not be presumed that public authorities would intend to occupy a public street so as to permanently obstruct it. The case stands alone and may well be explained by the reluctance of the court to permit the right to occupy a public thoroughfare to be gained by prescription.

[2, 3] We are satisfied that under the California cases herein cited the encroachment of a building obviously intended to be permanent upon the soil of another is a permanent trespass and that the cause of action based thereon is barred by Code Civ. Proc., sec. 338, subd. 2, in three years.

Judgment reversed.

SCHOTTKY, Justice pro tem., concurs.

BEAUDREAU v. ALLEN.
Civ. No. 4312.

District Court of Appeal, Fourth District, California.
Feb. 28, 1951.

Betty Beaudreau brought action against Chester T. Allen for rents allegedly due under lease of ranch lands, wherein defendant asked for rescission of the lease and that damages occurring to defendant as result of alleged misrepresentations by plaintiff when lease was entered into be offset against any sums found due plaintiff. A judgment for plaintiff was entered in the Superior Court of Kern County, W. L. Bradshaw, J., and the defendant appealed. The District Court of Appeal, Griffin, Acting P. J., held that evidence supported finding that defendant suffered no damage by reason of any claimed misrepresentation on plaintiff's part at time lease was entered into as to growth of grass growing on highlands of the ranch property.

Judgment affirmed.

1. Trial 🔑377(2)

Denial of defendant's motion to take additional testimony was proper, where proposed evidence would be but conflicting and would not be determinative of the case. Code Civ.Proc. § 956a; Rules on Appeals, rule 23.

2. Action 🔑55
Bankruptcy 🔑390

Defendant's motion for a continuance of original hearing of action for rents under lease of ranch lands and consolidation of present case with another case brought by third party against present plaintiff and present defendant for claimed destruction of grain crop on leased land because of fact that present plaintiff was a bankrupt was properly refused where there was no showing that defendant had become liable to third party for conversion of the grain or that he had paid for or had become liable for present plaintiff's claimed conversion of the grain. Code Civ.Proc. § 1048; Bankr.Act, § 75, sub. s, 11 U.S.C.A. § 203, sub. s.

3. Landlord and tenant 🔑231(6)

In action for rents allegedly due under lease of ranch lands, evidence failed to support defendant's contention that rescission of lease was effected by plaintiff's action after defendant's claimed discovery of claimed fraud in representing that highlands on ranch had a three year growth of grass growing thereon.

4. Landlord and tenant 🔑231(8)

In action for rents allegedly due under lease of ranch lands, evidence supported finding that defendant suffered no damage by reason of any claimed misrepresentation on plaintiff's part when lease was entered into that highlands of ranch had a three year growth of grass growing thereon.

5. Appeal and error 🔑1010(1)

Trial court's finding of fact, which has evidentiary support, cannot be disturbed on appeal.

Calvin H. Conron, Jr., Bakersfield, for appellant.

Siemon & Siemon, Bakersfield, for respondent.

GRIFFIN, Acting Presiding Justice.

Action for rents. On August 31, 1949, defendant and appellant, by written instrument, leased from plaintiff and respondent, for a period of five years, about 5000 acres of land in Kern County. Nearly 1000 acres of this ranch was classified as lowlands and about 500 acres thereof were tillable. The remaining portions were highlands fit for grazing. Defendant agreed to pay plaintiff $4500, payable $2000 down, $7000 on December 15, 1949, and $4500 per year thereafter. The lease also gave defendant an option to purchase the ranch after three years, for the sum of $100,000. In connection therewith defendant, under written contract of sale, agreed to purchase certain described agricultural implements located on the property for $4000, payable $500 upon the execution of the agreement and the balance of $3500 by December 15, 1949. Plaintiff, at the time, was in bankruptcy, and secured the permission of the Conciliation Commissioner to execute the instruments and also obtained permission to employ counsel to enforce the provisions thereof in plaintiff's name. Defendant paid $2000 down, took possession, and pastured about 204 cows. No further payments were made. This action is for recovery of $7000 rent due and for $3500 balance claimed due under the conditional sales contract for farming equipment.

Defendant, by answer, admits no further payments were made than here noted, but sets forth therein that plaintiff was guilty of fraud in obtaining the lease in that she previously represented to defendant "that said lands had not been grazed for a period of three (3) years, and had a three-year growth of grass growing thereon; that defendant believed the said representation of plaintiff and relied thereon, and that but for said representation defendant would not have entered into said lease; * * *. That after the execution of said proposed lease defendant went into possession of said lands and premises, and purchased and stocked said land with 204 head of cattle, and after grazing the lowlands which were available to defendant at the time of the execution of the said lease and at all times, defendant attempted to turn said cattle into the mountain grazing land, and upon said occasion for the first time discovered said grazing lands not to contain a three years growth of grass, but in truth and in fact defendant discovered said lands to be barren and unsuitable for grazing cattle at all". He claims he suffered damages thereby amounting to approximately $7500; that defendant thereafter "offered to surrender possession of said premises upon the return to defendant of the down payment of rent; that plaintiff has refused and still refuses to refund the said money, but thereupon requested defendant to continue in possession of said property and promised to make an equitable readjustment of the rentals provided in the said lease and to defer the rental dates; that relying upon such further promise of plaintiff, defendant has remained in possession thereof and has cultivated and planted approximately 400 acres to a crop of barley, of the present value of $8,000.00 * * *, that concurrently with the offer of defendant to surrender possession of said leasehold estate defendant offered to surrender possession of said personal property upon the condition that plaintiff refund to defendant the sum of $500.00, paid by defendant at the time of the execution of said alleged agreement * * *." It is further alleged that plaintiff failed to deliver to defendant one plow and one disc described in the contract of purchase, valued at $750. Defendant then asked for rescission of the lease and agreement and that the damages accruing to defendant be offset against any sums found due plaintiff.

About the time the case came on for hearing, counsel for defendant discovered that his client and plaintiff were being jointly sued by one Sanders, a bankrupt, through his trustee, for damages for $1500 for the value of a certain grain crop growing on the land, claimed to have been planted there under an oral lease with plaintiff, which crop defendant's cattle had devoured. Defendant immediately asked for a continuance of the instant action for the purpose of filing further defenses therein, and moved to consolidate the present action with that action.

The main question presented on this appeal is the sufficiency of the evidence to support the finding of the court that plaintiff was guilty of no fraud or misrepresentation which induced defendant to enter into the lease. The evidence on this question is somewhat in conflict. It is defendant's story that he and two others went to plaintiff's ranch, inquired about the pasture and rental terms; that plaintiff told defendant that the "ranch hadn't been fed on for three years"; that the only inspection he made of the property was just what he could "make on foot and in a car", i. e., the lower grounds and rolling hills containing approximately 1000 acres; that he believed plaintiff's representations as to the three-year growth of feed on the highlands.

Plaintiff testified that defendant drove all over the lower part of the ranch; that she not only suggested, but insisted, that defendant and the two others with him take her saddle horses and examine the highlands which could not be reached by automobile; that defendant refused because it would consume too much time; that all three replied they were satisfied with the ranch as they saw it; that she did not tell defendant that it had not been grazed for three years or that it had a three-year crop of grass untouched. In this connection the court found: "* * * that plaintiff informed defendant before the lease was made that she had not grazed the land for a period of three years, which was true; but that some of said lands had been grazed to some extent by stray stock; urged the defendant to make an investigation of such matter for himself, and offered to furnish him saddle horses with which to make such investigation; that defendant did not avail himself of said offer, did not make such investigation; but expressed himself as being satisfied with the condition as represented by plaintiff as aforesaid; and that it was not true that defendant would not have entered into said lease except for the representations he alleges were made by the plaintiff."

[1] At this point it should be noted that counsel for defendant moved this court, at the time of the argument on appeal, under Rule 23 of the Rules on Appeal, and Sec. 956a of the Code of Civil Procedure, to take additional testimony bearing on this evidence. He claimed, by affidavit, that since the perfection of the appeal he was told that plaintiff had executed a lease, and 164 head of cattle were grazing on plaintiff's premises from November, 1947, to July, 1948, and that rent was paid to plaintiff for that period. By counter-affidavit plaintiff claims that such cattle as were pastured there during the period in question were on the lowlands, which land was thoroughly inspected by defendant; that she had no knowledge of these cattle ever grazing on the highlands; that defendant Allen told her he did not intend to graze the ranch until spring of 1950; that he intended to fatten the cattle on the stubble and the partial crop of grain then growing on the lowlands and then he would sell the fattened cattle on the market.

The proposed evidence, if taken, would but create further conflict on the subject under discussion and upon which the trial court made definite findings. The granting of an application to take additional testimony is subject to several limitations. Estate of Schluttig, Cal.App., 218 P.2d 819; Tupman v. Haberkern, 208 Cal. 256, 268, 280 P. 970; Burton v. Los Angeles Railway Corp., 79 Cal.App.2d 605, 180 P.2d 367; Helmer v. Helmer, 87 Cal.App.2d 682, 197 P.2d 558.

In Wight v. Rohlffs, 9 Cal.2d 620, 72 P.2d 142, the court held that such a motion should be denied where the proposed evidence would not have been determinative of the case. In our view the proposed evidence here under consideration would be but conflicting and would not be determinative of the case. Accordingly, the motion should be denied.

[2] Defendant next assigns as error the refusal of the trial court to grant a

continuance of the original hearing of this case, and the refusal to consolidate this case with the other case brought against plaintiff and defendant for the claimed destruction of the grain crop. We see no merit to this argument. The record shows that this case was at issue and came on for trial March 17. A motion to amend the pleadings was made by the defendant. He was granted until March 21 to amend, and by consent of defendant the court then proceeded to trial on the issues previously presented. The trial was then continued at defendant's request until March 21 for further hearing. No further hearing was had until March 30, at which time all pleadings requested were allowed "to be filed" and the court then announced: "But as far as this court going into the merits of it, I think it would be improper". The reason assigned for the refusal to go into the merits of the new claimed defense was that since the plaintiff in this action was in bankruptcy, it would be improper to consider any claim arising against her in another action since no authority was obtained from the bankruptcy court to so proceed. Counsel for defendant made an offer of proof that in March, 1948, Mrs. Beaudreau made an oral lease of a portion of the property here under discussion to one Sanders for one year, on a crop-sharing rental of three-fourths of the grain harvested; that a crop of barley was planted and not harvested when Mrs. Beaudreau leased the premises to defendant, and that defendant had no knowledge of such oral lease or arrangements; and that his cattle did graze on said barley field; that he acted in good faith, under a believed claim of right under his lease. The court sustained an objection to the introduction of this testimony. The objection was that defendant Allen had not yet been subjected to any liability on account of any such claimed transaction nor called upon to make any such payment on behalf of the claimed actions of Mrs. Beaudreau, and that the determination of such a claim against her must be confined to the jurisdiction of the bankruptcy court. Thereafter, the case was submitted for decision.

There is no showing that the Sanders' action was or ever would be at issue or that the parties and issues of the two suits were the same. The trial court was not obligated nor authorized to consolidate the two actions for trial at that time. (Sec. 1048 C.C.P.; 1 Cal.Jur. pp. 372-373, sec. 50; Realty Const. & Mortgage Co. v. Superior Court, 165 Cal. 543, 132 P. 1048.) There was no showing that the bankrupt, Sanders, through the trustee, was authorized to bring such action against the bankrupt, Mrs. Beaudreau.

At the trial plaintiff testified, without objection, that she had some oral arrangements with Sanders in reference to the planting of barley, but that Sanders agreed to harvest the crop before August 1st; that the crop was a failure and Sanders started to harvest it but abandoned it about July 15 because it was not worth harvesting; that Sanders had no claim against her under any circumstances. The court made findings on this question and stated that defendant "nowhere claims or asserts in any of said pleadings that he has been compelled to pay or has paid to said third person any demand of the third person against plaintiff, or that said third person has in any manner interfered with his possession of the leased property, or that he has been ousted therefrom; that plaintiff has been adjudged a bankrupt under the provisions of Section 75(s) of the Bankruptcy Act [11 U.S.C.A. § 203, sub. s]"; and that on or about July 7, 1949, a general order was made by the District Court whereby it was ordered that all creditors of the plaintiff be enjoined and restrained from commencing or maintaining any proceedings in any court against plaintiff or any of her property until the further order of the court.

As we view the evidence, the ultimate effect of defendant's offer of proof, if granted, would be to delay the collection of rent due under the lease until it could be determined in the other action, whether or not defendant was entitled to an offset of any recovery that might possibly be obtained in that action, or that the court erred in refusing to permit the trustee for

Sanders to try to prove a liability against defendant in order that defendant might thereafter assert such liability as an offset against the rent.

Defendant does not admit liability under the claim. The facts offered or proved do not establish such liability on the part of the defendant. There is no showing that defendant became liable for a conversion of the grain or that he paid for or became liable for Mrs. Beaudreau's claimed conversion. The refusal of the trial court to hear the proffered testimony and to grant a continuance for that purpose was justified.

[3] Apparently the defendant's claim that a rescission of the lease was effected by the action of plaintiff is not too well founded because, after his claimed discovery of the claimed fraud, he planted the 400 acres to barley, which the court found, at the time of trial, to have a value of $8000. Counsel for defendant claims this valuation was excessive. We see no particular relevancy to this claim. He claimed that plaintiff and defendant agreed to readjust their differences in some manner, and accordingly he continued to occupy the premises. The trial court found against defendant's contention in this respect.

The ultimate finding was that defendant was indebted to plaintiff for $10,500, plus reasonable attorneys' fees agreed upon in the lease, fixed at $500, and denied any relief to defendant under his pleadings. A motion for new trial on the ground of newly discovered evidence and on all statutory grounds was made and denied. Complaint is made because the court failed to allow defendant's claimed offset for damages suffered by him. The court did find as true that the defendant stocked the land with 204 head of cattle; that he expended $2500 for feed and disposed of the cattle at a loss of $1000. It found as untrue that defendant was damaged in the sum of $4000 or any other sum.

[4, 5] While the items of claimed special damages to defendant are somewhat lacking in evidentiary support, the finding that defendant suffered no damage by reason of any claimed misrepresentation on the part of plaintiff, as heretofore related, has evidentiary support. This finding therefore cannot be disturbed on appeal. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301.

Judgment affirmed.

MUSSELL, J., concurs.

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102 Cal.App.2d 484

ALDRICH et al. v. RANKIN.

Civ. 4042.

District Court of Appeal, Fourth District, California.

Feb. 26, 1951.

E. L. Aldrich, and another, doing business as Industrial Power and Equipment Company, a corporation, brought an action against Bertha M. Rankin to recover an engine sold to defendant under conditional sales contract or, in the alternative, for damages, and defendant cross-complained. The Superior Court of Kern County, W. L. Bradshaw, J., rendered a judgment adverse to the defendant and the defendant appealed. The District Court of Appeal, Mussell, J., held, inter alia, that evidence sustained finding that the engine furnished to defendant was fit and suited for the defendant's purposes, and that defendant did not rely on a warranty of fitness and suitability.

Affirmed.

1. Appeal and error 🔑1011(1)

On defendant's appeal from judgment for plaintiff in action to recover an engine sold to the defendant under conditional sales contract, or, in the alternative, for damages, finding of trial court on conflicting evidence as to fitness and suitability of engine for defendant's purpose was conclusive.

2. Sales 🔑441(2, 3)

In action to recover an engine sold to defendant by plaintiff under conditional sales contract, or, in the alternative, for damages, wherein defendant cross-complained, evidence sustained finding that engine furnished to defendant was fit and suited for purposes of defendant, and that defendant did not rely on a warranty of fitness and suitability.

3. Sales ⚿481

Where defendant failed and refused to return engine or to permit plaintiffs to repossess engine, defendant could not recover down payment made on conditional sales contract whereunder engine was sold to defendant by plaintiff, regardless of whether conditional sales contract declared that down payment should be forfeited on breach as liquidated damages.

4. Sales ⚿479(7)

In action to recover an engine sold to defendent under conditional sales contract, or, in alternative, for damages, evidence sustained finding that reasonable value of engine when plaintiff attempted to repossess it for failure of defendant to make required payments, was $2100.

Dreyfus, McTernan & Lubliner and Benjamin Dreyfus, all of San Francisco, Dorris, Fleharty & Phillips and D. M. Phillips, all of Bakersfield, for appellant.

West, Vizzard, Howden & Baker and James Vizzard, all of Bakersfield, for respondents.

MUSSELL, Justice.

Action on conditional sales contract.

On August 28, 1946, plaintiffs and defendant entered into a conditional sales contract providing for the sale by plaintiffs to defendant of a "Buda" engine, carburator and pump. The total price of this equipment was stated in the contract to be the sum of $9,967.27, and while the price of the engine was not therein separately stated, the evidence is that it was $4,220.67, plus sales tax amounting to $105.52. Defendant paid the specified down payment of $3,000 but did not pay the balance which was due and payable on January 1, 1947. On January 15, 1948, plaintiffs filed the instant action for the recovery of the engine or, in the alternative, for damages in the sum of $4,600, and other relief. Defendant answered and cross-complained and alleged, among other things, that she had refused to accept the engine and rescinded the contract; that the engine delivered by plaintiffs failed to work properly, or at all; that it would not furnish water, and that plaintiffs had failed either to remedy or replace it, although they had repeatedly promised to do so. Defendant prayed for the return to her of the $3,000 down payment and for other relief.

The cause was tried before the court without a jury and on May 23, 1949, judgment was entered for the recovery of "a certain Buda engine * * *", or "in the event delivery cannot be had, the sum of $4,325.84", $300 attorneys' fees and costs. It was further adjudged that the cross-complainant be denied relief on the cross-complaint.

On July 26, 1949, the court amended its findings of fact and judgment to provide "that the reasonable value of the engine be declared to be the sum of $2,100, and judgment shall be that the plaintiffs recover the property, or in case the same cannot be had, then and in that event to recover the sum of $2,100, and that the findings of fact and judgment shall in all other respects remain the same."

The defendant appeals from the judgment of May 23rd and from the judgment as amended on July 26th.

The trial court found, in effect, that the engine was fit and proper and suited to the purposes for which it was purchased and that all of the allegations in the pleadings to the contrary were untrue. The findings in this respect are attacked by defendant on the ground of the insufficiency of the evidence to support them.

There is a conflict in the evidence as to the fitness and suitability of the engine. Defendant testified that it operated satisfactorily for a few hours after it was first installed; that the tubing then became covered with frost, causing the engine to stop; that she was able to start it again by pouring hot water on the tubing but the engine did not run continuously without defrosting; that the continuous trouble was due to the "Holzapfel" carburator furnished with the equipment and that plaintiffs failed to furnish an "Ensign" carburator as promised.

A dealer, handling "Ensign" carburators, testified that there were no carburators which could be used on butane and Buda engines of comparable quality to the "Ensign" and that the "Holzapfel" installed would not operate the engine properly; that he had inspected the equipment and found that the engine was carrying an extreme load for the "Holzapfel" and that it would "freeze up".

A mechanic, called by plaintiffs, testified that he was familiar with Holzapfel carburators and that their heat exchangers would not permit the passage of enough heat to vaporize the engine fuel; that this caused a "freezing" of the carburators.

In opposition to the foregoing evidence, Mr. Holman, one of the plaintiffs, testified that he installed the engine on August 6, 1946, to be used on one of the defendant's pumps then on her premises; that the pump described in the contract was never delivered to defendant because she refused to accept it; that there was some carburation service required on the engine after its installation and that he sent a man out to take care of it; that after the trouble, Mrs. Rankin stated that she wanted an "Ensign" carburator; that he provided one and sent a man out to install it, but that defendant refused to accept it or permit its installation.

A farmer, operating near the well on which the Buda engine was placed, and who was able to observe the operations on defendant's ranch, testified that to the best of his knowledge defendant's well was operated with the Buda engine and was pumping around 1800 or 1900 gallons per minute; that defendant had plenty of water for the crops that were to be irrigated by the well and engine; that he saw some ice on the carburator and that is was necessary to thaw it out a time or two; that this was not a daily occurrence but just happened occasionally and he had seen the same thing happen with the other pumps and that it was not an unusual occurrence in his experience; that after Mr. Holman's employee had run some copper tubing in the manifold, there was no trouble "to speak of".

Mr. Noble, an employee of the plaintiffs, testified that he went out in 1946 to work on the carburator; that the heat exchanger would "sort of get cool and freeze up" and that it was possible to adjust the cooling system to counterbalance the temperature. He testified to changing the line on the heat exchanger so that it would run by the manifold and that "somebody would tinker with the valve on the cooling system and it would be wide open"; that he later went out to exchange the heat exchanger and after putting on a new one, had no more calls from defendant to service the pump; that the "Holzapfel" carburator was the type that was being put on all Buda engines at that time; that his first service call was probably a week after the engine was installed; that a few days later he was called again and on this occasion he "found the valve was left open again, letting the water flow too fast through the engine"; that he shut the valve and changed the lines and told Mrs. Rankin that if the valve was kept pinched down it would keep the temperature up on the engine; that he was not called again to service the equipment.

[1] The trial court resolved the conflict in the evidence in favor of the plaintiffs and its finding as to the fitness and suitability of the engine is conclusive upon appeal. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Dillard v. McKnight, 34 Cal.2d 209, 223, 209 P.2d 387, 11 A.L.R.2d. 835.

[2] Defendant contends that there was a breach of warranty in that the engine furnished was not fit and suited for her purposes. However, the evidence heretofore discussed is sufficient to support the court's finding to the contrary and that defendant did not rely on such a warranty.

There is substantial testimony that she was able to irrigate her crops by using the Buda engine and Holzapfel carburator and that she did not attempt to rescind the agreement until some time in February, 1947, at which time the plaintiffs had already offered to furnish an "Ensign" carburator, which, according to defendant's testimony and that of her various witnesses, would have been required to insure satisfactory performance by the Buda engine. It appears that the complaints about the engine made by the defendant and particularly about the carburator were made prior to the signing of the contract on August 30, 1946, and "that she nevertheless signed the agreement on that date and completed the down payment."

[3] Defendant next contends that the conditional sales contract, insofar as it provides for liquidated damages, is void. However, the evidence is uncontradicted that the defendant failed and refused to complete the payments under the contract and refused to return the engine or permit the plaintiffs to repossess it. Under these conditions, the defendant may not recover the down payment made on the contract and it is of no moment whether or not the contract declares that such moneys shall upon the breach be forfeited as liquidated damages.

In Moore v. Mosher, 88 Cal.App.2d 324, 326, 198 P.2d 714, 716, the court said, quoting from cases therein cited: "'No rule is more firmly settled with relation to contracts for purchase, whether concerning real or personal property, than that to the effect that a vendee who without lawful right refuses to go on with his contract, cannot recover from a vendor not in default, who is ready and willing to proceed and fulfill all his obligations, all or any of the money that he had paid to the vendor in accord with the terms of the agreement. This rule has been uniformly applied in California. It was declared in both opinions in Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 10, 19, 20, 55 P. 713, 716, 720, 43 L.R.A. 199, 69 Am.St.Rep. 17, the opinion of Mr. Justice Henshaw saying that in such a case the vendor, "still resting upon the contract, * * * may remain inactive, yet retain to his own use the moneys paid by the vendee; so that it is of no moment whether or not the contract declares that such moneys shall upon the breach be forfeited as liquidated damages," and the opinion of Mr. Justice Harrison declaring it to be the law of the state that "the vendee, who was himself in default in the payment of a portion of the money, could not against the will of the vendor repudiate the contract and recover the portion already paid." Many cases might be cited in which this rule has been applied, but the rule is not disputed, and it is plain that plaintiff has no right of recovery here except upon the theory of mutual abandonment and rescission. Upon the facts of this case there is no other possible foundation for a right of recovery on the part of plaintiff.'"

[4] Finally, it is contended that the alternative judgment is invalid in that the value of the engine is fixed in the judgment as of the time of its sale and not as of the time of the attempted repossession. This contention is without merit. The testimony of the plaintiffs was that the sales price of the engine was approximately $4,300. Defendant testified that she had ascertained the then price of a Buda engine and that it was $5,676 f. o. b. Los Angeles. Mr. Holman testified that the market value for secondhand engines was cut in half. The equipment was used by defendant for approximately two months and there was testimony that there had been a fifteen per cent increase in the price since it was sold to the defendant. The evidence was sufficient to sustain the finding of the trial court in the amended judgment that the reasonable value of the engine at the time of the attempted repossession was the sum of $2,100.

The amended judgment is affirmed.

GRIFFIN, Acting P. J., concurs.

CALIFORNIA HOME EXTENSION ASS'N v. HILBORN.*

Civ. 4133.

District Court of Appeal,
Fourth District California.
Feb. 26, 1951.

Hearing Granted April 26, 1951.

California Home Extension Association, a corporation, brought an action against Bert Hilborn for money had and received and defendant cross-complained for an accounting, and alleged that defendant was entitled under agreement to 50% of net profits on sales of realty made by plaintiff corporation. The Superior Court of Riverside County, O. K. Morton, J., rendered a judgment in favor of the cross-complainant, and the plaintiff appealed. The District Court of Appeal, Mussell, J., held that there was no substantial evidence to support finding that there was an agreement between defendant and plaintiff for a division of profits, or that there was a joint venture between the parties.

Judgment reversed.

1. Evidence ⚷218, 265(18)

In action for money had and received, wherein defendant cross-complained for an accounting and alleged that defendant was entitled under agreement to 50% of net profits on sales of realty made by plaintiff corporation, testimony that defendant had stated that his claims against plaintiff consisted of a claim for moneys advanced to defendant, that defendant had a claim against plaintiff for damages because plaintiff had attached defendant's property, and that defendant had stated that he had been employed by plaintiff at a monthly salary, was admissible as admissions against interest, and trial court erroneously refused to consider such testimony in determining credibility of defendant's testimony.

2. Appeal and error ⚷1011(1)

A finding of trial court upon conflicting evidence will not be disturbed on appeal if there is evidence of a substantial character which reasonably supports judgment, but if evidence is so slight and tenuous that it does not create a real and substantial conflict, finding may be set aside.

3. Joint adventures ⚷5(2)

In action for money had and received, wherein defendant cross-complained for an accounting and alleged that defendant was entitled under agreement to 50% of net profits on sales of realty made by plaintiff corporation, no substantial evidence supported finding of trial court that there was an agreement between defendant and plaintiff corporation for a division of profits.

4. Joint adventures ⚷1.15

In action for money had and received, wherein defendant cross-complained for an accounting and alleged that defendant was entitled under agreement to 50% of net profits on sales of realty made by plaintiff corporation, no substantial evidence supported finding of trial court that there was a joint venture between parties.

5. Joint adventures ⚷1.7

A necessary element of a joint enterprise is an agreement between parties to share jointly in profits and losses.

Robert E. Austin, John N. Helmick, Los Angeles, and Joseph Seymour, Riverside, for appellant.

Jerome L. Richardson, and George E. Jones, Riverside, for respondent.

MUSSELL, Justice

Action for money had and received. Cross-complaint for an accounting.

Plaintiff and appellant filed an action in the Justice's Court of Riverside Township on February 7, 1945, for a money judgment against the defendant Bert Hilborn in the sum of $552.50. The complaint was verified by M. V. Hartranft, who was, at the time, the principal stockholder, president and managing officer of the plaintiff corporation. Six weeks later, Mr. Hartranft died and one year and four months after Hartranft's death, defendant Hilborn filed his answer and cross-complaint, by which he sought an accounting and claimed fifty per cent of the net profits on sales of real property made by the corporation. The action was transferred to the superior court for trial, where judgment was rendered in favor of cross-complainant Hilborn, and California Home Extension Association appeals from that portion of the judgment which awards cross-complainant Hilborn the sum of $36,513.76 and costs.

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* Subsequent opinion 235 P.2d 369.

Appellant contends that the findings and judgment are not supported by the evidence and that the court committed reversible error in rejecting certain evidence offered by the appellant.

The determination of the controversy herein turns upon the terms of employment and the amount of compensation payable to defendant Hilborn for services rendered to the plaintiff in conducting and managing certain land selling programs for and upon behalf of the appellant corporation.

The corporation was organized by M. V. Hartranft, who controlled it, was its president and managing director and owned practically all of the stock therein until his death on March 26, 1945. The record indicates that Hartranft decided all matters of business and policy of the corporation, was in charge of all corporate matters and personally decided upon resolutions to be adopted by the directors without the formality of directors' meetings.

Hilborn became associated with Hartranft on or about June, 1940, and during the first six months thereafter worked at appellant's main office in Los Angeles in connection with a land selling program known as "War Gardens". For the next two or three months he worked on a land selling program at Crestmore, California. This project was a failure and was abandoned. Appellant then acquired land in the LaSierra district of Riverside county, opened an office at Arlington, near said district, and installed Hilborn as office manager in charge of the sales campaign. Sales of property in the LaSierra district apparently began in May of 1941 and Hilborn remained as manager of the Arlington office from that time until December 31, 1944, when his business relations with appellant terminated.

The trial court found that Hartranft and Hilborn became associated in a joint venture in a real estate sales campaign in June of 1940; that Hilborn was to receive fifty per cent of the net proceeds of all lands sold and a drawing account of $75 per month to be charged against his share of the net profits. The principal contention of appellant is that these findings are not supported by substantial evidence.

Defendant was first employed by Hartranft in 1940. It is admitted that the terms of his employment were not then reduced to writing. While Hilborn testified that he was to receive fifty per cent of the net profits, the corporate records are entirely silent as to any such agreement. Hilborn testified that his contract of employment was reduced to writing in May, 1941, when he received by mail from Hartranft a document and carbon copy, reading as follows:

"We hereby elect Bert Hilborn, a stockholder, in the California Home Extension Association, as a vice-president and assistant Secretary of Chea. He is also elected manager of the Arlington Branch of this corporation and will act as our sales manager for the La Sierra district landselling *camapign.* On the same basis as the Crestmore campaign now being liquidated. He shall continue to receive a drawing *acount* plus actual expenses, of Seventy Five ($75.00) dollars per month and his compensation as sales campaign manager shall be on a fifty-fifty basis of the profits acquired by Chea. All titles of purchase and sale; all legal matters and determination of policy, as well as advertising, will be conducted *cy* Chea.

"Cal Home Extension Assn
By M V Hartranft
Prst"

The original of this alleged contract was not produced at the trial and the carbon copy was admitted in evidence as defendant's "Exhibit A". The defendant relies upon this document to establish a written agreement entitling him to a percentage of the profits of the real estate sales. In this connection, Hilborn testified that when he received the original of the quoted document, he affixed his signature thereto and gave it to Hartranft; that he did not see the document until he received it in the mail; that the original was signed by Hartranft; that he was thoroughly acquainted with Hartranft's signature and that the signature on Exhibit "A" was that of Hartranft. However, a handwriting expert produced by plaintiff, and whose qualifications were admitted, testified that in his opinion the signature of Mr. Hartranft on the questioned document was a tracing and that the instrument was typed on the same machine as other exhibits in the case, which were admittedly typed by Hilborn on his own typewriter. The instruments used as a basis of comparison, which were typed by Hilborn, and the questioned document, disclose an unmistakable common characteristic, namely, that the letters "oo" rather than the figures"00" are used in typing sums of money. This and other numerous common characteristics furnish ample ground to support the opinion of the expert. It is apparent that the testimony of Hilborn as to the signature and the execution of the questioned document is not supported by the record.

Hilborn's testimony that there was an agreement pursuant to which he was to receive fifty per cent of the sales profits is not borne out by the corporate records and correspondence before us. The auditor's report, accepted by the court, shows that Hilborn received a salary of $1250.85 for the period from June 1, 1940 to July 31, 1941. This amount was exclusive of his expenses, which were paid for separately. Hilborn wrote many of the checks, which bear the notation "Bert Hilborn-a/c salary-War Gardens", or a notation of similar import. Hilborn testified in this connection that he consented to the arrangement, indicating the payments to be salary only, because Hartranft insisted that for bookkeeping purposes they should be handled the same as salary paid to employees.

For the period beginning July 1, 1941, and ending on December 31, 1944, a different salary arrangement was made. On July 12, 1941, Wayne N. Graves, auditor for the appellant, wrote from Los Angeles to Hilborn, in part, as follows:

"Talking over with MVH the other day he thought it best to make a straight salary proposition for you instead of the way we have been going. Therefore starting the 1st of July you will be paid $200.00 per month, which includes the $30.00 car allowance. We will mail you checks from this office and you can then make *you* own payments.

"I will charge you for petty cash expenditures the 1st on until the 15th and then you should arrange to pay your own way out of your pay check. After that we'll make a settlement on the above amount due you."

On the same date the auditor instructed the company bookkeeper as follows:

> "Starting the 1st of July you will pay out of Chea and charge same to Crestmore pay-roll account.—
> Bert Hilborn $200 per month
> Make chceks on the 15th and 30th of each month, deducting the 2% for Soc. Sec. and Calif. Unempl. Tax. First check July 15th. Above per instructions of M.V.H."

The first checks received by Hilborn after July 1st, 1941, were issued twice each month and were for $100 payments, less two per cent deductions. Later, further deductions were made for withholding income taxes. Some of these checks were deposited directly in Hilborn's personal bank account in Los Angeles and duplicate deposit slips mailed to him. Other similar checks were prepared by Hilborn himself and drawn on the corporation's Arlington bank account. Letters written by Hilborn to the company bookkeeper show that Hilborn regarded the payments made by the corporation as salary.

On November 20, 1944, Hartranft wrote to Hilborn complaining about Hilborn's management of company business, stating, in part:

"I have got to make a new deal with you. Have been hoping that I could consolidate our work over to Arlington but it cannot be done.

"I have always hoped that I could lead you into a good position to operate directly upon your own on and as a Broker.

. . . .

"We will close up our deal, December 31st. . . . ."

On January 3, 1945, Hilborn wrote to the company auditor, stating that he was sending a closing sheet showing that he, Hilborn, had advanced in all $1149.95 and had given Chea credit for "$600.oo" received from funds which he had handled and stating that there was a balance due him of $549.95. A careful examination of all the correspondence and records concerning payments made to Hilborn disclose the fact that nothing was ever said about amounts, if any, due Hilborn as his share of the profits realized from the sale of the corporate property, nor during the entire period of Hilborn's employment was any such alleged agreement mentioned.

The fact that Hilborn received and retained salary checks without objection for more than three years strongly indicates an acceptance of the salary as payment in full for his services.

Hilborn did not purchase any of the real estate which was sold by the corporation and it seems unlikely that Hartranft would under those conditions agree to pay him fifty per cent of the net profits of real estate sales in addition to a salary of $200 a month and the further sum of $4,230.91, which appears to have been paid Hilborn largely for his expenses, such as meals away from home, gasoline, and other expenses incident to trips made by him.

[1] In this connection appellant offered to prove by the testimony of two witnesses that a few days after Hartranft's death, Hilborn stated that his claims against plaintiff corporation consisted of a claim for five or six hundred dollars for moneys advanced to appellant; that he had a claim against appellant for damages because it had attached his property; that he had been employed by appellants at a salary of $200 per month and expenses and that he wanted to be re-employed by the corporation on those terms. The offered testimony was admissible as admissions against interest and the court erroneously refused to consider it in determining the credibility of Hilborn's testimony.

[2] A finding of the trial court upon conflicting evidence will not be disturbed upon appeal if there is evidence of a substantial character which reasonably supports the judgment. However, if the evidence is so slight and tenuous that it does not create a real and substantial conflict, the finding may be set aside. Fewel & Dawes, Inc., v. Pratt, 17 Cal.2d 85, 89, 109 P.2d 650. In Herbert v. Lankershim, 9 Cal.2d 409, 471, 71 P.2d 220, 251, the court, after stating the rule that an appellate court will not interfere with the judgment entered by a fact finding body when there exists a substantial conflict in the evidence, said:

"This rule, however, does not relieve an appellate court of its duty of analyzing the evidence in the light of reason and human experience and giving consideration to the motives and propensities which tend to influence or prompt human action, in an effort to solve the question as to whether the judgment is reasonably and substantially sustained by the evidence.

"* * * There must be more than a conflict of mere words to constitute a conflict of evidence. The contrary evidence must be of a substantial character, such as reasonably supports the judgment as applied to the peculiar facts of the case. The rule announced in Morton v. Mooney et al., 97 Mont. 1, 33 P.2d 262, 266, correctly states the rule which has been approved by this court in a number of our decisions. It is thus stated: 'While the jurors are the sole judges of the facts, the question as to whether or not there is substantial evidence in support of the plaintiff's case is always a question of law for the court (Grant v. Chicago etc. Ry. Co., 78 Mont. 97, 252 P. 382), and, in determining this question, "the credulity of courts is not to be deemed commensurate with the facility or vehemence with which a witness swears. 'It is a wild conceit that any court of justice is bound by mere swearing. It is swearing creditably that is to conclude the judgment.' " ' "

[3–5] Applying the rules announced in the foregoing decisions to the evidence before us, we conclude that there is no substantial evidence to support the finding of the trial court that there was an agreement between Hilborn and plaintiff corporation for a division of profits. The finding that there was a joint venture between the parties is likewise without substantial evidentiary support. One of the necessary elements of a joint enterprise is an agreement between the parties to share jointly in the profits and losses. Freedman v. Industrial Acc. Comm., 67 Cal.App.2d 629, 631, 154 P.2d 922.

In Beck v. Cagle, 46 Cal.App.2d 152, 161, 115 P.2d 613, the court held that to constitute a joint enterprise, the parties must have a community of interest in the purposes of the undertaking and equal authority or right to direct the movements and conduct of each other in connection therewith; they must share in the losses, if any, and there must be a close and even fiduciary relationship between them.

The land selling campaign conducted by the parties hereto at Crestmore, California, on which Hilborn worked for two or three months, resulted in a loss of $11,097.78. This loss was borne entirely by appellant and it does not appear that there was any agreement to share profits or the *loss* which might result from it or any other such selling campaign. It is significant to note that even the claimed contract of May, 1941, states that Hilborn is to act as sales manager for the new project "on the same basis as the Crestmore campaign now being liquidated."

The trial of the instant action was in two parts, the first being on the issue of whether or not Hilborn was entitled to an accounting. At the conclusion of this phase of the action, the court entered an interlocutory decree in favor of Hilborn and appointed a referee to take an account of the business of plaintiff corporation. The second part of the trial was devoted to a consideration of the referee's report and after numerous hearings thereon, the court filed its amended findings of fact, which, in part, were that the total gross sales and income derived by cross-complainant (cross-defendant intended) was the sum of $254,767.50; that the total cost of said land so sold, together with all expenses in connection with the sale thereof, is the sum of $159,181.37, leaving a net profit of $95,586.13, consisting of $49,133.73 cash earned profits and $46,452.40 unearned profits represented by eighty-four outstanding contracts; that cross-complainant is entitled to and there is due to him under the terms of said contract one-half of said net profits, to wit, $47,793.06, less the sum of $11,279.30 advanced to cross-complainant as a drawing account and other cash advances, leaving a balance of $36,513.76 due cross-complainant from cross-defendant under the terms of said contract. In its findings, the court approved the recommendation of the referee that the amount due cross-complainant be settled by paying him $6,688.25 cash and transferring and assigning to him forty-two of the outstanding contracts on which there was due and unpaid the sum of $29,825.21. The judgment, however, was for the sum of $36,513.76 and contained no provisions as to its payment.

Hilborn alleged that according to the agreement he was to receive fifty per cent of the net profits derived from the sale of lands when *final payments* had been made by the purchasers. The unpaid balances due on these executory contracts were not due at the time of the judgment and may never be collected in full. Furthermore, the judgment is for an amount arrived at on the basis of all sales made over the entire period from June, 1940, to April, 1949, and the record shows that Hilborn's employment terminated in 1944. Under these conditions, the evidence does not support a judgment in the sum of $36,513.76.

Judgment reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

102 Cal.App.2d 493

CITY OF OAKLAND v. DARBEE et al.

No. 14406.

District Court of Appeal, First District,
Division 1, California.

Feb. 27, 1951.

The City of Oakland, acting by and through its Board of Port Commissioners, brought an eminent domain proceeding against Annie H. Darbee, Andrew L. Darbee, and others, to condemn six contiguous parcels of land situated in Alameda County for airport purposes. An order transferring the proceeding for trial as to named defendants from Alameda County to Contra Costa County was entered by the Superior Court in and for the County of Alameda, Ralph E. Hoyt, J., and the plaintiff appealed. The District Court of Appeal, Wood, J., held that where eminent domain proceeding was brought by City of Oakland, situated in Alameda County, in the Superior Court of Alameda County to condemn six contiguous parcels of land situated in the County, and residents of the City and County of San Francisco were owners of one of the parcels, motion of the residents of City and County of San Francisco to transfer the proceeding as to them to a neutral county was properly granted.

Order affirmed.

1. Eminent domain 🔑253(1)

An appeal does not lie from order on a motion of certain of the defendants in eminent domain proceeding by city to condemn six contiguous parcels of land for separation of the proceedings as to them. Code Civ.Proc. §§ 936, 956, 963.

2. Venue 🔑36

The statute allowing either party in action or proceeding brought by county, city and county, or city, against a nonresident to move for change of venue applies to an action or proceeding brought in a nonneutral county, not to action brought in a neutral county. Code Civ.Proc. § 394.

3. Venue 🔑41

Where eminent domain proceedings to condemn six contiguous parcels of land was brought by City of Oakland, a city situated in Alameda County, and nonresidents were owners of one of the parcels, such owners were entitled to move to have the proceeding transferred for trial to a county other than that in which plaintiff city was situated and other than that in which defendants resided. Code Civ.Proc. § 394.

4. Venue 🔑36

The statute allowing either party in action or proceeding brought by county, city and county, or city, against a nonresident to move for change of venue applies to any action or proceeding brought by county, city and county, or city against a nonresident, and is not limited to condemnation proceedings. Code Civ.Proc. § 394.

5. Venue 🔑50

The purpose of statute allowing either party in action brought by county, city and county, or city, against a nonresident to move for change of venue is that of protecting either parties from local bias. Code Civ.Proc. § 394.

6. Venue 🔑41

Fact that statute allowing either party in action or proceeding brought by county, city and county, or city, against a nonresident to move for change of venue uses the singular instead of the plural in defining rights of nonresident defendant to transfer, does not indicate intention that right of transfer should be granted only in case in which all of the defendants were "residents of another county or of other counties". Code Civ.Proc. § 394.

7. Venue 🔑41

Where eminent domain proceeding was brought in Superior Court of Alameda County by City of Oakland, a city situated in Alameda County, to condemn six contiguous parcels of land, and nonresidents were owners of one of the parcels, motion of nonresidents, to transfer the proceedings as to them to a neutral county would not be denied because some of the other defendants resided in Alameda County. Code Civ.Proc. §§ 394, 395, 396b, 1243.

8. Venue 🔑68

The statute allowing either party in action or proceeding brought by county, city and county, or city, against a nonresident to move for change of venue did not impose a duty upon the defendants as the moving parties in condemnation proceeding brought by a city, to show more than that the proceeding was brought in the county in which plaintiff city was situated and that the defendants, as the moving parties, lived in another county, identifying that county, and they had no duty to negative other counties by proving what other counties were counties of residence of other individual defendants or places of business of corporate defendants in the proceeding. Code Civ.Proc. § 394.

9. Evidence 🔑22(2)

The activities of a private corporation are not among the facts of which courts take judicial notice. Code Civ.Proc. § 1875.

10. Evidence 🔑20(2)

The courts could not take judicial notice of the fact, if it were a fact, that the Bank of America was doing business in Contra Costa County. Corporations Code, §§ 313, 832, 2711, 4115, 5705, 5902, 6600, 6602; Code of Civ.Proc. § 1875; 12 U.S.C.A. §§ 21–200.

11. Action 🔑57(1), 60

The word "action", as used in statute providing that an action may be severed and actions may be consolidated in discretion of court, whenever it can be done without prejudice to a substantial right, includes a special proceeding, such as eminent domain proceeding. Code Civ.Proc. § 1048.

See publication Words and Phrases, for other judicial constructions and definitions of "Action".

12. Venue 🔑78

Where City of Oakland, situated in the Alameda County, brought eminent domain proceedings in Superior Court of Alameda County to condemn six contiguous parcels of land situated in that county, and nonresidents were owners of one of the parcels, and the proceeding against the nonresidents was separated from the proceeding against other defendants upon their motion, subsequent order of transfer of proceeding to Contra Costa County, as a neutral county, upon motions of the nonresidents pertained only to them and parcel of land owned by them. Code Civ.Proc. §§ 394, 1048, 1244, subd. 5.

13. Venue 🔑71

Where City of Oakland, situated in Alameda County, brought eminent domain proceedings in Superior Court of Alameda County to condemn six contiguous parcels of land situated in the county, and nonresidents were owners of one of the parcels, motion by nonresidents for separation of proceeding against them from proceeding against other defendants bore a definite relation to their prior motion for change of venue, and, hence, order of separation was not void upon theory that after filing of the motion for change of venue the Alameda Court, had no jurisdiction to perform any judicial act in the proceeding until it had decided that motion. Code Civ.Proc. §§ 394, 395, 396b, 1048, 1244, subd. 5.

14. Eminent domain 🔑262(1)

Upon appeal from order granting motion of nonresident defendants under statute to transfer condemnation proceedings brought by city to condemn six contiguous parcels of land as to them to a neutral county, the review included a review as to validity of an order separating proceeding against nonresident defendants from proceeding against other defendants, though separation order was a nonappealable intermediate ruling, since validity of the separation order necessarily affected validity of the order granting change of venue. Code Civ.Proc. §§ 394, 956, 1048, 1244, subd. 5.

◆

W. Reginald Jones, Port Atty., Edward A. Goggin, Asst. Port Atty., Oakland, for appellant.

Edwin Sprague Pillsbury and Erskine, Pillsbury & Tulley all of San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiff City of Oakland appeals from an order transferring an eminent domain proceeding for trial (as to defendants Annie H. and Andrew L. Darbee) from Alameda County to Contra Costa County.

The proceeding was filed in the Superior Court of Alameda County to condemn for airport purposes six contiguous parcels of land situate in that county. Each parcel is severally owned by one defendant or a group of defendants, none of whom has any right, title or interest in any of the other parcels. Respondents own one of these parcels and at all times involved have been residents of the City and County of San Francisco. Some of the other defendants, owners of other parcels, reside in Alameda County.

On July 11, 1949, respondents filed (1) a notice of motion for an order directing separation of the proceeding against them from the proceeding against all other defendants, and (2) a notice of motion for an order transferring the proceeding, as to them, to a superior court in and for a county other than Alameda County and other than the City and County of San Francisco, a motion based upon section 394 of the Code of Civil Procedure.

Each motion was heard on December 2, 1949, and granted by minute order entered that day.

[1] The appeal is solely from the order of transfer. An appeal does not lie from the order of separation. See Code Civ. Proc., §§ 936, 956, and 963.

Appellant claims the order of transfer erroneous because (1) some of the other defendants reside in Alameda County, the county in which the proceeding was brought and (2) respondents did not in support of their motion make a showing "as to what county is neutral, i. e., as to what county there is in which none of the defendants resides or is doing business."

We do not find the order erroneous. The applicable statute, Code Civ.Proc., § 394, does not make respondents' right of transfer dependent upon the residence of other defendants, owners of other parcels, nor does it require respondents to select the county or to make a showing concerning a county other than the county of their residence or the county in which appellant city is situated.

[2] The statute declares that *"Whenever an action or proceeding is brought by a* county, city and county, or *city, against a resident of another county, city and county, or city,* or a corporation doing business in the latter, *the* action or *proceeding must be, on motion of either party, transferred for trial to a county,* or city and county, other than the plaintiff, if the plaintiff is a county, or city and county, and *other than that in which the plaintiff is situated,* if the plaintiff is a city, *and other than that in which the defendant resides,* or is doing business, or is situated." (Emphasis added.) It applies, of course, to an action brought in a nonneutral county, not to an action brought in a neutral county. See City of Stockton v. Wilson, 79 Cal.App. 422, 424, 249 P. 835.

[3] The mandate of this statute applies precisely to the facts of this case, insofar as appellant and respondents are concerned. The proceeding was brought by the City of Oakland, a city stituated in Alameda County, against the Darbees, residents of the City and County of San Francisco, which is "another county, city and county, or city" than the plaintiff city or the county in which the plaintiff city is situated. Upon motion of either party (respondents made the motion) the *"proceeding must be* * * *transferred for trial* to a county * * * other than that in which the plaintiff is situated * * * and other than that in which the defendant resides * * *." (Emphasis added.) Upon respondents' motion, in compliance with the mandate of the statute, the superior court transferred the proceeding for trial to Contra Costa County, a county other than that of respondents' residence and other than that in which appellant city is situated. Here are the facts which bring the mandate of the statute into play and demonstrate that the court below fully and properly carried out that mandate.

Appellant would read into the statute a number of additional elements (requirements and exceptions) which we do not find expressed in or necessarily implied from its provisions.

Appellant says that the policy of this statute is to protect a nonresident defendant in an eminent domain proceeding from the niggardly verdict which tax-conscious jurymen might award him, more niggardly than one they might award a fellow county man. This tax-conscious feature, says appellant, is not present here because the Board of Port Commissioners, the agency through which the City of Oakland is here operating, does not have the power of taxation. Therefore, appellant would have us conclude, the reason for literally applying the provisions of the statute is wanting in this case, especially when there are defendants residing in Alameda County and their right to have the action against them tried by a jury summoned from the vicinage is valuable and ancient.

[4, 5] The fallacy of this argument stems from the fact that the statute is not narrowly limited to condemnation proceedings. It applies to any action or proceeding brought by a city against a nonresident, upon whatsoever kind of claim the city might have against him, including a claim that bears no relation to the taxing power, one that would have no tendency to arouse the prejudices of tax-conscious jurymen. The purpose of the statute is that of protecting either party from local bias. City of Stockton v. Ellingwood, 78 Cal.App. 117, 121, 248 P. 272. It gives either party the option of removal to a neutral county. Besides, though the Board of Port Commissioners may lack the taxing power, the parent body, plaintiff city, has and may exercise that power.

[6] Next, appellant represents that because the statute uses the singular, instead of the plural, in defining the rights of nonresident defendants to transfer, it is limited to cases in which a city brings an action against a single defendant, or, an action in which none of the defendants is a resident of the county in which the action is brought; hence, is inapplicable here, there being several defendants, some of them residents of Alameda County.

We derive no such legislative intent from the statute. It says: "Whenever an action or proceeding is brought *by a* * * * * * * *city, against a resident* of another county, city and county, or city, * * * the * * * proceeding must be, on motion of *either party*, transferred for trial to a county * * * other than that in which the *plaintiff* is situated, if the plaintiff is *a city*, and other than that in which the *defendant* resides * * *." (Emphasis added.) The use of the singular (defendant, resident, plaintiff, city) was well calculated to accord each such party the right to demand and obtain a transfer under the indicated circumstances, regardless of the number of other parties (plaintiff or defendant) in the action or proceeding. Had the Legislature said "against residents of another county" instead of "against a resident of another county," there would be a possible inference that the Legislature intended to grant the right of transfer only in a case in which *all of the defendants* were "residents of another county, or of other counties." Interestingly enough, we observe that this statute once read in the plural: "against citizens of another county" Stats. 1891, p. 56; "against residents of another county" Stats. 1907, p. 700; amended in 1915 to "a resident of another county" Stats. 1915, p. 721. The subsequent legislative change to the singular lends added emphasis to the view which we have expressed.

[7] Decisions relied upon by appellant in support of its contention that the order should be reversed because some of the other defendants reside in Alameda County, are inapplicable. Those decisions construe and apply section 395 of the code, which, unlike section 394, declares that the county in which the defendants "or some of them" reside at the commencement of the action is the proper county for the trial of the action. They also involve section 396b which provides for transfer when a proceeding is commenced in a court having jurisdiction of the subject-matter but which is *not* the court designated as the "proper" court for the trial,—quite different from the instant proceeding, commenced in the court of the county where the lands to be taken are situated, as required by § 1243, Code Civ.Proc., hence in the "proper" court. That county happens to be the county in which the plaintiff city is situate, and respondents reside in another county. That brought the mandate of section 394 into play when invoked by respondents.

Another point urged by appellant is predicated upon the fact that respondents, in support of their motion for a transfer, tendered no evidence that there was a county in which no defendant corporation was doing business and in which none of the other individual defendants resided, to which the proceeding might be transferred; particularly, no evidence that Contra Costa was such a county. In this connection appellant directs attention to the fact that Bank of America National Trust & Savings Association, a national banking association, was one of the parties complaint; that one of appellant's affidavits in opposition to the motion for a transfer showed that shortly prior to the filing of the complaint a preliminary report issued by a title company indicated that certain of the parcels of land described in the complaint were vested in the bank, and that appellant joined the bank as one of the defendants in its original complaint filed herein. This falls short of evidence that the bank, upon the filing of the complaint or at any time thereafter (only the amended, not the original, complaint is in the record on this appeal) had any interest in any of the land described in the complaint. The amended complaint, at most, alleges that the "defendants are the owners or claim some interest in and to" those lands, and the affidavits of both parties to this appeal show that none of the other defendants, individual or corporate, had any interest in the land owned by respondents. In addition, there is not one scintilla of evidence in the record herein that any of the defendants resided or was doing business in Contra Costa County.

Yet, upon this slender basis for suggesting that the Bank of America was a real party in interest in the proceeding, appellant builds the argument that the bank presumably was doing business in every county in the state, including Contra Costa, a presumption which, appellant says, it was the duty of respondents to rebut, if they could, by evidence adducible at the hearing of their motion for transfer.

[8] This argument is unsound for several reasons. We find nothing in the statute which imposed a duty upon respondents, as the moving parties, to show more than (1) that the proceeding was brought in the county in which plaintiff city was situate, and (2) that respondents lived in another county, identifying that county (in this case, San Francisco); no duty to negative other counties by proving what other counties were counties of the residence of other individual defendants or of the places of business of corporate defendants.[1]

[9, 10] Upon the showing which respondents did make herein, it became the duty of the trial judge to select a county and transfer the proceeding to that county. This he did. In the record before us, which was the record before him, there is nothing whatsoever to indicate that Contra Costa was not an available county, even if for the moment we assume the validity of appellant's contention that if a corporate defendant were doing business in that county, then the Contra Costa court was not an available recipient of the transfer. For there is no evidence in the record that any defendant resided or was doing business in Contra Costa County. That the Bank of America probably was doing business in Contra Costa County is but speculation and surmise, not a judicially cognizable fact. The activities of a private corporation, like that of a natural person, are not among the facts of which courts take judicial notice, as listed in section 1875 of the Code of Civil Procedure. Moreover, the Corporations Code specifies what is "evidence" or "prima facie evidence" of the formation, § 313, of the by-laws and proceedings, § 832, of revivor after suspension of powers upon nonpayment of taxes, §§ 5705 and 5902, of merger or consolidation, § 4115, of authority for disposition of assets, § 3904, and of the sale of shares of stock, § 2711 of corporations. As to foreign corporations, sections 6600 and 6602 of that code specify what is "evidence" of their existence and powers, and declare that the courts shall take judicial notice of the Constitution and statutes, and of the official

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[1] In contrast, see the somewhat detailed specification of procedural requirements of Code Civ.Proc. § 398 in respect to a a "proper" court.

acts (affecting corporations) of the legislative, executive and judicial departments of the state or place of incorporation. We do not derive from such statutes any suggestion of a legislative intent that the courts take judicial notice of the fact, if it be a fact, that Bank of America was doing business in Contra Costa County. We find nothing in the federal statute under which national banking associations are incorporated, 12 U.S.Code, §§ 21–200, 12 U.S.C.A. §§ 21–200 that indicates an intent upon the part of Congress to require the courts, state or federal, to take judicial notice of the business activities of any such association.

There is implicit in appellant's argument the view that if the record showed that the Bank of America was doing business in every county in this state (or, in every county except Alameda) there would be no county to which the court could transfer the proceeding in response to respondents' motion. That would not necessarily follow. It might mean merely that the bank could not invoke the statute (and that the plaintiff city could not do so, if its motion were predicated upon the bank's places of business), simply because there would be no county, or other county, in which the bank was not doing business. The bank's inability to invoke the statute should not destroy or impair the right which the statute gives the respondents.

[11, 12] If it did appear that Bank of America was doing business in every county except Alameda and San Francisco, and, further, that the bank moved for transfer under section 394 at the same time as did the respondents herein, separation of the proceeding as to the bank or the respondents or both would be indispensable to their respective rights of transfer under section 394. The Legislature has anticipated such situations by the provisions it has made for separation. "An action may be severed and actions may be consolidated, in the discretion of the court, whenever it can be done without prejudice to a substantial right" Code Civ. Proc., § 1048. "Action" as therein used includes a special proceeding. City of L. A. v. City of Huntington Park, 32 Cal.App.2d 253, 269–270, 89 P.2d 702, an eminent domain proceeding. This statute is supplemented by the special and not inconsistent provision that all parcels of land lying within a county and required for the same public use may be included by a condemner in the same or separate proceedings "but the court may consolidate or separate them to suit the convenience of the parties" Code Civ. Proc., § 1244, subd. 5. A separation was made by the court below, with the result that its order of transfer to Contra Costa County pertained only to respondents herein and the parcel of land owned by them, leaving the proceeding in Alameda County in respect to all other parcels and all other defendants.

[13] But, says appellant, that order of separation was void, upon the theory that from and after respondents' filing of a motion for a change of venue the Alameda court had no jurisdiction to perform any judicial act in the proceeding until it decided that motion. We find no such provision in section 394. The decision which appellant cites, Beard v. Superior Court, 39 Cal.App.2d 284, 102 P.2d 1087, in support of this point construed and applied a quite different change of venue statute, Code Civ. Proc., §§ 395 and 396b, one which applies to the case in which an action is not commenced in the "proper" county and a nonresident defendant moves for transfer to the county of his residence. In such a case, section 396b requires the defendant to file his notice of motion for transfer "at the time he answers or demurs," judicially interpreted as requiring that the motion be decided upon the basis of conditions existing in the case at that time. That provision of section 396b also operates to suspend the power of the court (from the filing of notice of motion until the filing of the court's order deciding the motion) to perform any other act of a substantive nature in the case, save for those excepted acts which are specified in the provisos of section 396b or in other applicable statutes.

In the Beard case, the superior court, pending the motion for change of venue, made an order for support, attorney's fees and costs *pendente lite* (in an action brought under section 196a of the Civil

Code), an order which was void because not within the scope of the exceptions then allowed by the provisos of section 396b. In each of the cases cited in the Beard case the situation was similar, an order made pending a similar motion for change of venue: an order passing upon a demurrer to the complaint, Nolan v. McDuffie, 1899, 125 Cal. 334, 336, 58 P. 4; an order awarding alimony, made during the period prior to mention of any exception in the predecessor statute, section 396, Hennessy v. Nicol, 1894, 105 Cal. 138, 142, 38 P. 649; refusal of appellate court to compel the superior court to make an order for counsel fees and costs, prior to the listing of any exceptions, Walsh v. Superior Court, 1919, 44 Cal.App. 31, 32, 185 P. 998; and an order overruling defendant's demurrer to the complaint during the pendency of its motion for transfer. Pickwick Stages System v. Superior Court, 1934, 138 Cal. App. 448, 449, 32 P.2d 433. The reason for the suspension of such powers of the court is that if a defendant is entitled to have his motion for change of venue granted, he is entitled to have such matters heard before the court of the county of his residence; also, in respect to the pleadings, the motion for transfer must be decided upon the basis of their status as of the date of the filing of notice of the motion.

That reasoning does not logically require suspension of the court's power to act upon matters which are incidental or ancillary to consideration of and action upon the motion for transfer itself. Nor does it apply with full force to a motion for transfer based upon section 394, notice of which need not be filed when defendant first appears, Daneri v. City of San Diego, 55 Cal. App. 562, 203 P. 829, and Mono Power Co. v. City of Los Angeles, 33 Cal.App. 675, 166 P. 387, a motion which, as in the instant case, was noticed and heard in a proceeding which was commenced and pending in a "proper" court.

Respondents' motion for separation bore a very definite relation to their motion for transfer. It was noticed and heard at the same time as the motion for transfer. The notice said the motion would be "based upon the ground of convenience of the parties," the records and papers on file, and a certain affidavit. The affidavit, among other things, said that respondents had filed or were about to file "pursuant to the provisions of Section 394 of the Code of Civil Procedure, a motion for an order transferring the above proceeding, as to them, to a county other than Alameda or the City and County of San Francisco," and that "It is not known whether any or all of the other defendants intend to, or will, make a similar motion [for transfer]."

The decision of the superior court upon both of respondents' motions was embodied in a single minute order. The clause thereof which granted the separation immediately preceded the clause that ordered the transfer. Thus, it is clear that the two motions and orders were intimately related, one to the other, and were so regarded by the superior court. Its consideration of the proposal for separation was based principally, if not wholly, upon that relation, incidental to and in aid of the demand for transfer, a desire to satisfy that rightful demand of respondents with the least of inconvenience to other parties.

[14] Yet, appellant, while vigorously urging the invalidity of the order of separation in aid of its attack upon the order for transfer, asserts that the order of separation is not reviewable upon this appeal because it is not an appealable order. Anomalous, indeed, would it be if the order for transfer depended upon the order of separation for its validity and the validity of the latter could not be considered and determined until there is an appeal from a final judgment entered after a trial upon the merits. Appellant, of course, cannot confer jurisdiction upon this court by urging the invalidity of the separation order, but the very insistency of its urge tends to demonstrate that the two orders are closely related and that the separation order is a nonappealable "intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the" order of transfer, an intermediate order which this court may review "Upon an appeal" from the order of transfer as

provided in section 956 of the Code of Civil Procedure if "judgment" as used in that section includes an appealable order as well as the final judgment in the action. The section states what a court may review "Upon an appeal from a judgment". It does not say "final judgment in an action," nor "a judgment that finally determines all the issues presented by the pleadings." The reasonable intendment of the Legislature was to declare the scope of review upon an appeal in a civil action or proceeding, an appeal from any appealable decision, whether the decision takes the form, nominally, of a judgment or an order. That review includes any nonappealable "intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the" appealable decision under consideration by the reviewing court.

We have not found a decision discussing this precise point. But there are two Supreme Court decisions, and one appellate, that apply the principle without mention of section 956. Upon an appeal from a special order made after final judgment, an intermediate nonappealable order may be reviewed. In Lane v. Pacific Greyhound Lines, 30 Cal.2d 914, 187 P.2d 9, the propriety of an order granting relief from default in moving to tax costs after judgment became final was deemed reviewable upon appeal from the later and final order taxing costs. In Miller v. Miller, 26 Cal. 2d 119, 156 P.2d 931, upon appeal from an order vacating a final decree of divorce, two antecedent (intermediate) orders denying motions for continuance of the motion to vacate were reviewed. In Hayes v. Pierce, 18 Cal.App.2d 531, 64 P.2d 728, an order setting aside a default and the judgment entered thereon, conditioned upon defendants paying plaintiff's costs in a specified amount, was reviewed upon appeal from the final order unconditionally setting aside the default and judgment, a final order made after defendant had tendered payment of those costs.

The statutory basis for these rulings appears to be the provisions of section 956 which we have quoted. We consider that those provisions apply with equal force to an appealable order made prior to final judgment on the merits, and to any nonappealable order or ruling intermediate thereto "which involves the merits or necessarily affects" the appealable order.

We conclude that the order granting respondents' motion for separation is reviewable upon this appeal; and that the trial court had jurisdiction to consider that motion, and committed no error in granting it.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

NEGRA v. L. LION & SONS CO.

Civ. 7860.

District Court of Appeal, Third District, California.

Feb. 23, 1951.

Hearing Denied April 19, 1951.

Natalina Negra sued L. Lion & Sons Company, a corporation, to recover for personal injuries sustained by her when she fell into a floor furnace from which defendant's workmen had removed the surface grating while engaged in the task of installing carpeting in plaintiff's home. The Superior Court, Merced County, Sischo, J., entered judgment upon a jury verdict in favor of plaintiff, and defendant appealed. The District Court of Appeal, Van Dyke, J., held that the evidence sustained the jury's findings that the conduct of defendant's workmen had been negligent and that the plaintiff had not been guilty of contributory negligence.

Affirmed.

1. Negligence 🔑55

Where removal of grating was necessary and appropriate to proper performance of work of laying carpet, carpet installers' removal of grate was not, in itself, act of negligence upon which housewife could predicate claim for personal injuries sustained in falling into floor furnace normally covered by grating.

2. Negligence 🔑136(14)

Generally speaking, degree of care required under any given circumstances and question as to whether or not that degree was attained by one charged with negligence are questions of fact for jury and not question of law.

3. Appeal and error 🔑1008(1)

Negligence of defendant, like contributory negligence of plaintiff, is generally question of fact for determination by trier of facts whose findings will not be disturbed on appeal if there is substantial evidence to support them.

4. Appeal and error 🔑1008(1)

On appeal by defendant from judgment for plaintiff in personal injury action, appellate court would have to consider and accept evidence which supported judgment.

5. Negligence 🔑134(1)

In action brought by housewife against carpeting seller to recover for personal injuries sustained when plaintiff fell into floor furnace from which workmen installing carpeting had removed grating, evidence sustained jury's finding that the conduct of defendant's workmen had been negligent.

6. Negligence 🔑135(1)

In action brought by housewife against carpeting seller to recover for personal injuries sustained when plaintiff fell into floor furnace from which workmen installing carpeting had removed grating, evidence sustained jury's implied finding that housewife had not been guilty of contributory negligence.

7. Negligence 🔑67

People walk about their homes with such sense of familiarity as to justify some relaxation of care reasonably required of them when walking in strange places.

8. Appeal and error 🔑1004(1)

Jury's verdict cannot be disturbed on appeal unless so disproportionate to sum reasonably warranted by facts as to shock sense of justice and raise presumption that it was result of passion and prejudice.

9. Damages 🔑132(6)

Award of $30,000 as damages for personal injuries consisting of knee cut severing nerves and blood vessels, and followed by atrophy and wasting away of muscle tissue was not excessive.

10. Jury 🔑70(8)

Where sheriff kept special list containing 700 or 800 names of persons residing in township who were willing to serve as jurors, special venire obtained from such list could not be said to have been summoned by "bystanders" within prohibition of Code of Civil Procedure section regarding special venires. Code Civil Procedure, § 227.

See publication Words and Phrases, for other judicial constructions and definitions of "Bystanders".

11. Appeal and error 🔑200
Jury 🔑70(10)

In personal injury action, where original panel was exhausted and court ordered special venire, giving sheriff about two hours to bring special venire before court, and no objection was made by either side to that limitation of time, no such irregularity existed as to call for criticism or reversal of judgment subsequently obtained by reason of sheriff's summoning special venire from list of 700 or 800 names of willing jurors, notwithstanding fact that all of jurors on list resided within one township. Code Civil Procedure, § 227.

C. Ray Robinson, R. A. McCormick and Margaret A. Flynn, all of Merced, for appellant.

Campbell, Hayes & Custer, San Jose (Edward J. Niland, San Jose, of counsel), for respondent.

VAN DYKE, Justice.

Plaintiff and respondent, with her husband, is a resident of Los Banos. For about six years they had occupied a residence, the floor plan of which, so far as material here, may be described as follows: The living room was 13 x 21 feet. Near the southeasterly portion thereof a four foot open archway gave entrance to the dining room, which measured approximately 12 x 12 feet. Across the dining room French doors gave exit to a rear porch.

Beneath the dining room there was a floor furnace, the metal grating over which formed part of the floor surface. The grating measured approximately 20 inches in the square. It was located six inches from the southerly portion of the open arch. Just prior to July 29, 1948, respondent had purchased carpeting for her home from defendant and appellant and on the morning of July 29th two of appellant's employees arrived with the carpet, prepared to lay it in the living room and dining room and in a rear hall just south of the dining room. They first laid the carpet in the living room, and having completed that task they next moved into the dining room. In order to lay the carpet in the dining room it was necessary to remove the grating over the floor furnace, tack the carpet down around the hole, cut around the hole with a knife, then replace the grating so that its exterior edges would extend over the carpet immediately around the hole. The workmen informed respondent and her husband that the grating had to be taken off in order to lay the carpet and respondent testified that she knew the grate had been removed for that purpose. After the grate had been removed there was some talk about cleaning out the floor furnace while the grate was off, and some little time later the workmen called to respondent, saying that if she would "come and vacuum it, the floor furnace, that they were ready to put the grate back on again." Respondent said that she immediately left her work, came into the dining room with the vacuum cleaner and vacuumed the lint out of the furnace cavity and then went back into the living room where she was engaged in putting that room in order. She further said that when she had finished cleaning around the floor furnace with the vacuum cleaner she went back into the living room without looking around the dining room to see how far the work of laying the carpet had progressed. An interval of time, fixed by the testimony as 10 or 15 minutes or possibly longer, elapsed. It appears that in order to properly lay the carpet it was further necessary to remove from its hinges the door leading into the back hall. This was done by one of the men and he carried the door up approximately to the archway where he spoke to respondent, indicating his intention to place the door in the living room. As respondent said, "He said, 'what shall I do with this door, shall I put it into the living room?'" Respondent, when spoken to, looked toward the workman and saw him standing with the door in his arms, with one end approximately at the southerly frame of the arch and the rest extending diagonally into the dining room in such a position as to obscure from her view the rest of the dining room, including the point where the grate was off the floor furnace. Respondent, seeing him so standing with the door under his arm, told him not to bring it into the living room because she had cleaned up in there, but to put it on the back porch where it would be out of the way. She then described what happened as follows: "So he hesitated with the door, not knowing what to do with it, looking in different directions and so I saw that he wasn't sure where the back porch was, so I said, 'I will open the door for you', and I pointed toward my back doors and he still hesitated so I started forward and as I stepped forward he saw that I was trying to get across and he tried to clear a road for me to get through or something, when as I took that second step back, it wasn't still clear, and as he cleared the view it was too late, I was going into the furnace then, by the time he cleared the view I was falling in." Again she said, "Because he looked toward the kitchen and around and I pointed toward the doors [the French doors to the back porch] and he still hesitated, so I says, 'I will open them for you' and then as I stepped forward and tried to get across, then he still hesitated and then I took a step to the left and as I took that step to the left he finally noticed that I was trying to get across there and he started moving that door, my leg—I was already taking that other step as the view cleared, my leg was going in there. And I still tried to grab for the door but it was too late." She was asked if she looked where she was going and answered, "Well, I didn't feel like I should because he said that they were ready to put that grate back when I got through vacuuming. * * * Well, as I walked, all I could see was that door in front of me. * * * I was looking at his face when he was talking to me and I was talking back at him. * * * Q. And you were not watching where you were walking, isn't that correct? A. Why, no. * * * I wasn't watching, naturally walking, that floor there was nothing to watch, it was a level floor. Q. * * * But a few minutes before you had seen the grille off, had you not? A. But they said they were putting it back on and I took it for granted that it was back on. * * * Once they tell me that the grille is going to be put back immediately and I was in the room [the living room] about, at least 10 minutes, I just forgot it because I took it for granted that it was back on there. * * * I don't mean forget it, I just took it for granted that the grille was back on there, there was nothing to be thinking about." It further appears that the workmen, having moved into the dining room to lay the carpet there, had been working there for quite some time before respondent cleaned out the furnace opening. The evidence is quite conflicting as to just how far the work of laying the carpet had progressed, but it appears without conflict that the two men were still working there when the accident happened.

A jury returned a verdict in favor of respondent in the sum of $30,000 for the injury she received and from the judgment entered thereon this appeal was taken.

Appellant contends that the evidence is insufficient to establish any negligence on the part of appellant's employees and that as a matter of law respondent herself was contributorily negligent. Appellant further contends that the damages awarded are not supported by the evidence and are grossly excessive. Finally, appellant contends that the court committed reversible error in overruling defendant's objection to the method used in selecting a special venire which was ordered in when the regular panel had been exhausted.

[1] In support of these contentions, appellant argues, first, that the removal of the grate was not in itself an act of negligence, since it was necessary and appropriate to the proper performance of the work of laying the carpet. This point is not, and we think could not be, controverted by respondent. Next, appellant says that since respondent knew the grate had been removed and the reason for its removal, she had full knowledge of the existence of this obvious danger to anyone walking across the floor in the vicinity of the opening and that no duty was cast upon them to warn her when she walked toward that opening that the grate had not been replaced. They point out they did not request her to enter the room; that she walked into it of her own volition; that notwithstanding the door in the arms of the workman temporarily obscured her vision, she went forward and just as the obstruction to her vision cleared and without looking where she was placing her foot she stepped into the opening. They argue that the workmen's statement, when they called her into the room to clean the furnace, that they were then ready to put the grate back on, was not an assurance that, within the short space of time elapsing, they would at once replace it and did not justify her assumption that they had put the grate back on and her further assumption that it was therefore safe for her to walk across it without looking to see if it was in fact there; that there was by the circumstances detailed above nothing requiring them when she entered the room to give her further warning than was afforded by her previous knowledge the grate had been removed and of the reason for its removal, or do anything to prevent her progress into the opening. They point out what is the undisputed fact that the opening was so close to the entrance to the dining room as to require but a single step to reach it.

[2, 3] Generally speaking, the degree of care required under any given circumstances and the question as to whether or not that degree was attained by one charged with negligence is a question of fact for the jury and not a question of law. Malone v. Clemow, 111 Cal.App. 13, 295 P. 70. Negligence of a defendant, like contributory negligence of a plaintiff, is generally a question of fact for the determination by

the trier of fact whose finding will not be disturbed on appeal if there is substantial evidence to support it. McWane v. Hetherton, 51 Cal.App.2d 508, 511, 125 P.2d 85.

In defense of the judgment on the question of appellant's negligence, respondents advance the following argument: They say the negligence lay: a. In failing to replace the grate as the workmen said they were ready to do, and leaving the opening in the floor unguarded; b. In failing to warn respondent as she was about to enter the room that they had not replaced the grate and that the opening was unguarded; c. In holding the door so as to obstruct respondent's view.

We think respondent's counsel have made the only charges of neglect that could be made under the circumstances of this case. If there was negligent conduct toward respondent it must have begun after, having cleaned out the furnace, respondent left the dining room, for there is and could be no contention that the removal of the grate was not an act required in the performance of the work, done with respondent's full knowledge. If there was negligence, then it must have begun when the workmen told respondent they were ready to put the grate back in, resulting, as she testified, in the creation of an impression in her mind, after the lapse of ten or fifteen minutes, that the grate had been replaced and that she could, therefore, move about her home with her accustomed freedom. It appears that the grate, in place, was a part of the flooring designed for and reasonably adapted to general floor usage, including walking upon it, with no more reason to look at that spot before stepping on it than there would have been as to any other portion of the floor.

[4, 5] We must, of course, consider and accept the evidence which supports the judgment. We have, then, the following factual situation: Appellant's workmen had removed the grate which was a part of the flooring of the dining room. This created a situation dangerous to anyone stepping from the living room into the dining room near the southerly margin of the open arch between the rooms. They informed respondent of that fact and of the reason for the removal of the grate and that it would be replaced at some time during their operations; when she cleaned the furnace they told her it was an appropriate time for her to do so because they were ready to replace the grate immediately. They did not replace it. The workman then carried the door into such a position as to obscure the view into the dining room from the living room. He then asked where to put the door and if it could be placed in the living room. She asked him to place it on the back porch which was across the dining room. While the door was being so held she approached the archway. The workman began moving the door to enable her to enter the dining room, as was her apparent intention expressed by the words "I will open the doors for you." He did not warn her that if she followed her apparent path she might step into the hole past the end of the door he was moving out of her way, although it was reasonably apparent to him she intended to walk there and that she was apparently oblivious of the danger confronting her. We think that the foregoing statement is within the limits of the testimony and that the jury so believing the facts and drawing permissible inferences therefrom could justifiably find that this course of conduct was negligent. We hold, therefore, upon this branch of the case that the judgment is supported by the evidence.

[6, 7] Coming now to the contention of appellant that respondent was guilty of contributory negligence as a matter of law, we find appellant urging that respondent was not entitled to walk without looking when she knew that the grating had once been removed; that she could not, as a reasonably prudent person assume that in the interval of time between their statement to her that they were ready to replace the grate immediately and her act of walking into the dining room they had, in fact, replaced the grate. Appellant argues that the hole in the floor was an obvious danger, easily seen if looked at and that respondent cannot square her conduct in not looking before she stepped with the standard of reasonable care. We think it must be conceded that, in view of the situation presented by this

record, the question of contributory negligence is a close one. But we do not think that the implied finding of the jury that respondent was not guilty of contributory negligence can be said here to be without support in the evidence. Little more need be said than has been said while discussing the question of appellant's neglect. Respondent was in her own home. True, the workmen were also within it and were engaged in their work in the dining room where the danger lay. But people walk about their homes with such a sense of familiarity as to justify some relaxation from the care reasonably required when walking in strange places and we think the jury could find that, under the circumstances here, her assumption that the grate had been replaced, coupled with the omission of the workman as he stood holding the door in front of the hole in the floor to give any warning in the face of her expressed intention to step into the room, was reasonably careful conduct on the part of respondent.

[8] As to the claimed excessiveness of the verdict, we think little need be said. In the beginning it is appropriate to restate the well-established rule that a jury's verdict cannot be disturbed on appeal, unless so disproportionate to a sum reasonably warranted by the facts as to shock the sense of justice and raise a presumption that it was the result of passion and prejudice. Potter v. Empress Theatre Co., 91 Cal.App.2d 4, 13, 204 P.2d 120.

[9] Respondent received a cut in the knee, resulting in a muscular injury, followed by atrophy and the wasting away of the muscle tissue. An expert witness testified that the musculature involved would probably never return to normal. She received also a nerve injury and the same expert said that the nerves would never regenerate. This witness also said he was positive that a future operation would be necessary and that it would consist in removal of the knee-cap; that respondent was bedridden for four months with the leg immobilized for that time; that muscular activity had been very slow in returning because she was not able to use the leg on account of pain; that the consequential favoring of the injured leg resulted in the hip rising so as to throw the pelvis out of position and cause backaches and joint aches in the hip; that the nerve and blood vessels severed were impossible of repair and respondent will be partially incapacitated and suffer pain for the rest of her life. She had suffered more than a thousand dollars special damages to the time of trial and would have to undergo further expense in an effort to repair the damaged member. There was testimony that she would never regain the full, normal use of her leg; that she had worked in a department store, which necessitated standing, and in contrast was still unable at the time of trial to do parts of her housework and was unable to stand for any long period without pain; that the continuing pain from her injury still kept her awake at nights. A motion for new trial upon the ground, among other grounds, of excessiveness of damages, was made and denied by the trial court. We think it apparent from the foregoing that the verdict cannot be disturbed here on the ground of its being excessive.

Appellant contends further that the trial court committed error in the matter of selection of the special venire. The following occurred: Twenty-four persons responded to the general venire summons. Ten were excused for cause, eight were challenged by one party or the other and excused. The original panel was thus exhausted, with six people in the jury box. The court ordered a special venire. A deputy sheriff returned a special venire of ten persons. He testified upon interrogation by counsel for the appellants that he had by telephone requested the attendance of these persons; that they all lived within the City of Merced, except two, who lived outside those limits and within the township which includes Merced; that he obtained the names by reference to a list of people whom he knew were willing to serve as jurors, which list he kept and which contained seven or eight hundred names. He made up the list, he said, by asking jurors who had served if they were willing to serve again on call and if they said they would be so willing he put their names on his list; that when he got orders to summon a special venire for a jury trial he called people on this list, since in such a situation he was rushed and using the list was the best he could do; that to get the ten people he had caused to appear he had called forty-two persons on the list, starting at the top and going along until he got ten, which was the number required by the court's order. He concluded by stating that "there is no other way in God's world in an hour or two to get this amount of people". Counsel for the appellant thereupon challenged the special venire upon the ground that it had not been called from the body of the county, but came in fact from the City of Merced and the township which includes the same. Section 227 of the Code of Civil Procedure provides: "When there are not competent jurors enough present to form a panel the court may direct the sheriff * * * to summon a sufficient number of persons having the qualifications of jurors to complete the panel, in superior courts from the body of the county, or city and county, in municipal courts from the body of the city, or city and county, and not, in either case, from the bystanders".

[10] It is not, and could not be, contended here that the special venire were summoned from bystanders. But it is claimed that to summon a special venire from a single township within a county is to fail to comply with the mandate of the statute that they be summoned from the body of the county. The case of Livesey v. Stock, 208 Cal. 315, 321, 281 P. 70, 72, is pertinent. We quote the following:

> "The presence of illegality respecting the impaneling of a jury in a civil cause is never a jurisdictional question, but it is, at most, but error in the exercise thereof. Amos v. Superior Court, 196 Cal. 677, 239 P. 317. A challenge leveled at the panel is not contemplated by the statute in civil cases. The remedy allowed is a challenge to the individual juror. Section 601, Code Civ.Proc.; Estate of Wall, 187 Cal. 50, 200 P. 929.
>
> "The general objection here made to the panel amounted to no more than a challenge thereto. Morever, the error was at most but technical, for under sections 204 and 206 of the Code of Civil Procedure, a regular panel for the Long Beach superior court would have consisted of persons selected 'from the names of men and women residing within the township within which said city is located.' While sections 226 and 227 do not contain a similar provision, still directing the sheriff to remain in a given township while seeking a special venire, so long as they were not taken from bystanders, would seem to be a matter of small consequence."

Also in People v. Flores, 15 Cal.App.2d 58, at page 71, 58 P.2d 1311, at page 1317, where irregularities were claimed in the summoning of a special venire, the court stated: "Even assuming that there were irregularities in the summoning of a special venire, section 4½ of article 6 of the Constitution is applicable, and will apply if, after examination of the entire record, including the evidence, it appears, as in this case, that a miscarriage of justice has not resulted therefrom. People v. Stennett, 51 Cal.App. 370, 398, 197 P. 372."

[11] It was not contended in the trial court, and is not here, that the deputy sheriff summoning the special venire was himself either prejudiced or biased or that he acted from improper motives, nor did the trial court in its order direct that the special venire be summoned from any particular part of the county. What the officer did appears clearly to have been dictated by the practicalities of the situation. He was given about two hours to bring a special venire before the court and no objection was made by either side to this limitation of time. Under the circumstances we conclude that no such irregularity existed as to call for criticism and certainly not for reversal of the judgment.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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TREMEROLI v. AUSTIN TRAILER EQUIPMENT CO. et al.

Civ. 14427.

District Court of Appeal, First District, Division 1, California.

Feb. 26, 1951.

Rehearing Denied March 28, 1951.

Hearing Denied April 26, 1951.

Johnny Tremeroli, doing business under the fictitious name and style of Johnny's Trucking Service, brought action against Austin Trailer Equipment Company, Utility Trailer Sales Company, a copartnership, and others, to recover for damages sustained when plaintiff's tractor and semi-trailer smashed into an embankment allegedly caused by failure of a fifth wheel, a device which connected and held the tractor and semi-trailer together, which had been purchased by plaintiff from the defendant Utility Trailer Sales Company, and had been manufactured by the defendant Austin Trailer Equipment Company. From judgment and orders entered in the Superior Court in and for the City & County of San Francisco, Robert McWilliams, J., all of the parties appealed. The District Court of Appeal, Peters, P. J., held that full profits that plaintiff would have earned had his equipment not been damaged was a recoverable item, and if evidence of profits was not available, loss of use could be shown by what it would have cost to rent comparable equipment.

Judgment in accordance with opinion.

1. Sales 🔑427

Negligence is no part of cause of action against seller for breach of implied warranty of fitness of goods for the purpose for which purchased. Civ.Code, § 1735.

2. Sales 🔑441(3)

Evidence that a fifth wheel, a device which connected and held tractor and semi-trailer together, was properly serviced and maintained by buyer after it had been installed by seller, who knew purpose for which device was required, and that the fifth wheel failed in normal use, sustained finding that there was a breach by seller of an implied warranty of fitness of the device for the purpose for which purchased. Civ.Code, § 1735.

3. Appeal and error 🔑1010(1)

Appellate court cannot disturb trial court's finding of fact unless there is no evidence or no reasonable inference from the evidence to sustain the finding, and such rule applies to a finding of proximate causation.

4. Sales 🔑441(3)

Where a mechanical device fails in normal use and has been properly maintained, that is a field test that supports implied finding that device was not reasonably fit for purpose intended. Civ.Code, § 1735.

5. Sales 🔑441(3)

Even if evidence of a latent defect in a fifth wheel, a device which connected and held tractor and semi-trailer together, were necessary to show breach of implied warranty of fitness of the device for purpose for which it was purchased, evidence showing that the castings in the device had too high a sulphur content, which would have a tendency to make them brittle, supported finding of a latent defect. Civ.Code, § 1735.

6. Sales 🔑268(2)

Under Uniform Sales Act, implied warranty of fitness of the goods for the purpose for which purchased extends to latent defect, even though seller is not the manufacturer. Civ.Code, § 1735.

7. Sales 🔑268(2)

Where defect in a fifth wheel, a device which connected and held tractor and semi-trailer together, was latent, and there was evidence that seller knew purposes for which the fifth wheel was wanted, and that buyer relied on seller to supply a fifth wheel which would perform that function, the parties were not on equal footing, since in such situation statute imposed against seller an implied warranty of fitness of the device for the purpose for which purchased, even against latent defects. Civ.Code, § 1735.

8. Judgment 🔑199(3.5)

The fact that trial court granted one of the defendants a new trial on ground of insufficiency of evidence did not determine that trial court should have granted such defendant's motion for judgment notwithstanding the verdict, since different principles govern such motions.

9. Judgment 🔑199(3.11)

A defendant was entitled to a judgment notwithstanding verdict only if there was no conflict in the evidence on the issue under which defendant was sought to be held liable.

10. Appeal and error 🔑1015(2)

Plaintiff was entitled to reversal of order granting defendant manufacturer, who was sought to be held liable under theory of negligence, a new trial on ground of insufficiency of evidence only if evidence without conflict showed that such defendant was negligent, and if there was a conflict on the issue it was within trial court's power to grant the new trial on ground of insufficiency of evidence.

11. Appeal and error 🔑979(2)

Where trial court grants motion for new trial on ground of insufficiency of evidence, appellate court will interfere only in rare cases showing abuse of discretion, since trial judge must weigh all the evidence and determine the just conclusion to be drawn therefrom.

12. New trial 🔑70, 71

The trial court cannot be held to have abused its discretion in granting motion for new trial on ground of insufficiency of evidence, where there is a conflict in the evidence or where there is any evidence which supports a judgment in favor of the moving parties.

13. Judgment 🔑199(3.10)

Trial court should grant defendant's motion for judgment notwithstanding verdict only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiff.

14. Negligence 🔑27
Sales 🔑278

Under Uniform Sales Act, a manufacturer who is not a seller to the consumer is not liable to the consumer in warranty, but manufacturer may be held liable for its negligence, and privity between manufacturer and consumer is not required. Civ.Code, § 1735.

15. Negligence 🔑27

A duty of care exists on part of manufacturer regardless of privity of contract not only where the article manufactured is inherently dangerous but also where it is reasonably certain, if negligently manufactured, to place life and limb in peril.

16. Negligence 🔑136(18)

Evidence presented question for jury as to whether manufacturer of a fifth wheel, a device which connected and held tractor and semi-trailer together, was negligent in the manufacturing process, so as to render manufacturer liable for damages to owner of tractor and semi-trailer caused by equipment smashing into embankment as a result of the fifth wheel failing while in normal use.

17. Judgment 🔑199(3.6)
New trial 🔑71

Where evidence and reasonable inferences therefrom were in conflict as to whether manufacturer of a fifth wheel, a device which connected and held tractor and semi-trailer together, was negligent in the manufacturing process, so as to render manufacturer liable for damages sustained by owner of tractor and semi-trailer when equipment smashed into embankment as result of the fifth wheel failing while in normal use, trial court correctly denied defendant manufacturer's motion for judgment notwithstanding the verdict, but acted within its powers in granting defendant manufacturer's motion for new trial on ground of insufficiency of the evidence.

18. Damages 🔑163(1)

Plaintiff has burden of proving his damages with reasonable certainty.

19. Sales 🔑442(1)

In action by owner of tractor and semi-trailer for damages sustained when equipment smashed into embankment, allegedly caused by failure of a fifth wheel, a device which connected and held the tractor and semi-trailer together, brought against seller of the device on ground of breach of implied warranty and against manufacturer of device on ground of negligence, cost of repairs, other costs caused by the injury, loss of profits, cost of rental of substitute equipment and similar charges were the normal items of damage. Civ. Code, §§ 1735, 3333.

20. Damages ⚷40(1), 190
Sales ⚷441(4), 442(6)

In action by owner of tractor and semi-trailer for damages sustained when equipment smashed into embankment, allegedly caused by failure of a fifth wheel, a device which connected and held the semi-trailer together, brought against seller of the device on ground of breach of implied warranty and against manufacturer of the device on ground of negligence, plaintiff was entitled to recover loss of profits as result of having his equipment smashed as an element of damages, but proof as to sums which plaintiff was compelled to pay subhaulers was not proof of such loss of profits. Civ.Code, § 3333.

21. Damages ⚷39

In a proper case, loss of use of damaged vehicle is a recoverable item of damages. Civ.Code, § 3333.

22. Damages ⚷39

In a proper case, owner of damaged vehicle may show reasonable value of loss sustained by being deprived of use of his vehicle as an element of damage by reasonable rental value of such equipment, regardless of whether substitute equipment was in fact rented.

23. Damages ⚷174(1)
Sales ⚷440(4)

In action by owner of tractor and semi-trailer for damages sustained when equipment smashed into embankment, allegedly caused by failure of a fifth wheel, a device which connected and held the tractor and semi-trailer together, brought against seller of device on ground of breach of implied warranty and against manufacturer of device on ground of negligence, if evidence of profit that plaintiff would have earned if his equipment had not been damaged was not available, loss of use could be shown by what it would have cost to rent comparable equipment. Civ.Code, §§ 1735, 3333.

Hadsell, Sweet, Ingalls & Murman, San Francisco, for plaintiff-appellant.

Brobeck, Phleger & Harrison, San Francisco, for defendant-appellant Austin Trailer Equipment Co.

Harold H. Price, San Francisco, for defendants-appellants Utility Trailer Sales Co., a copartnership, John N. Baird, Lavell S. Durell and Fred L. Sargent, copartners.

PETERS, Presiding Justice.

This action was instituted by Johnny Tremeroli, doing business as Johnny's Trucking Service, against Austin Trailer Equipment Company, a Michigan corporation that manufactures trailer equipment and parts, and Utility Trailer Sales Company, a partnership that sells and installs trucking equipment, to recover damages for losses alleged to have occurred when a tractor and semi-trailer of plaintiff were involved in an accident. The accident is alleged to have been caused by reason of the breaking of a portion of a so-called fifth wheel, the device which connects and holds the tractor and semi-trailer together. This fifth wheel was manufactured by Austin and purchased from and installed by Utility. The complaint alleges two causes of action against each defendant—one on the theory that defendants were negligent in various alleged particulars, and one for breach of warranty, which the evidence discloses was implied and not express. Each defendant denied the allegations of negligence, denied that there was any warranty, and affirmatively alleged contributory negligence on the part of plaintiff.

The court instructed the jury that, as to Utility, plaintiff had failed to produce any evidence of negligence, and that that issue was withdrawn from its consideration. The court further instructed that, as to Austin, the cause of action based on warranty was withdrawn from the jury's consideration because the evidence demonstrates that there was no privity of contract between plaintiff and Austin. Thus, the case was submitted to the jury, on proper instructions which are not challenged, as to Utility on the issue as to whether there was or was not a breach of implied warranty, and as to Austin whether it was or was not negligent. The jury returned a verdict against both defendants in the sum of $12,500. Both defendants moved for judgment notwithstanding the verdict, which motions were denied, the trial court writing a most helpful memorandum opinion setting forth its reasons for the denial. Judgment on the verdict was then entered, and both defendants moved for a new trial. The motion of Utility was denied, but the motion of Austin was granted on the ground of insufficiency of the evidence. Again the trial court filed a helpful memorandum opinion explaining the reasons for its actions. In this opinion the court stated that under the provisions of the Uniform Sales Act the seller warrants against latent defects where the buyer makes known the purpose for which the article is required, and it appears that the buyer relied on the seller's skill and judgment. The court held that the evidence disclosed that plaintiff relied on Utility to select the fifth wheel; that the purpose for which it was to be used was known to the seller; that the buyer could not have discovered the latent defect by inspection, and that any hardship on the seller is alleviated by the fact that the seller may recover from the manufacturer any damages recovered from the seller by the buyer. But as to Austin, the trial court stated that its motion for a new trial should be granted because of insufficiency of the evidence. The court stated, in its opinion, that it was not granting the new trial on the issue of contributory negligence on the part of plaintiff. It analyzed, in some detail, the expert testimony introduced, and concluded, as to Austin, that "the evidence leaves the cause of the accident in the realm of surmise and conjecture which will not justify a verdict against" this defendant.

From the judgment and orders the following appeals have been taken:

1. Utility appeals from the judgment and from the order denying its motion for judgment notwithstanding the verdict.

2. Austin appeals from the order denying its motion for judgment notwithstanding the verdict and from the judgment against it. (That this is proper procedure see § 629, Code Civ.Proc. and Rule 3(a) of the Rules on Appeal.)

3. Plaintiff appeals from the order granting Austin a new trial.

The General Facts Applicable to all Appeals.

Plaintiff has operated a trucking business for the past twelve years. In 1941, or thereabouts, he started to do business with Utility, and thereafter made several purchases from Utility of trailers, equipment and fifth wheels. In February of 1946 plaintiff purchased a tractor from the Diamond T. Company, and also purchased a semi-trailer. He instructed the Diamond T. Company to send the tractor to Utility to have a fifth wheel installed. A fifth wheel is the mechanism by which a tractor, the automotive unit, is hooked up to a semi-trailer, the cargo unit, which has no motor of its own and has only rear wheels, its front portion resting on the tractor. The hooking and pulling unit between these two pieces of equipment is the fifth wheel. A semi-trailer usually comes equipped with its portion of the fifth wheel which fits on top of the lower fifth wheel which has to be installed on the tractor. It is this lower fifth wheel that is here involved. It is a large circular metal plate in which there is a slot to fit the pin of the upper fifth wheel. On either side of the bottom of the lower fifth wheel are bearings or brackets, which are supported by a horizontal axle that passes through the bearings. This axle also passes through other bearings or brackets that are attached to the frame of the tractor. After the accident, later described, these bearings were broken, and plaintiff claims that it was their failure that proximately caused the accident. There is no doubt that the bearings were broken after the accident, and that the breaks are in the form of shearing fractures, that is, a snapping off of parts of each bearing.

Utility is a partnership engaged in the business of selling trailers, and maintaining equipment and fifth wheels. According to plaintiff's testimony, when he, through the Diamond T. Company, ordered the fifth wheel installed, he left the selection of the type of wheel to Utility, as he had in prior transactions, and neither plaintiff nor the Diamond T. Company specified the make or type of fifth wheel to be installed. Plaintiff did not know that an Austin fifth wheel had been installed until he accepted delivery of the equipment after the installation. Utility, at that time, was selling several different types and makes of fifth wheels and it selected the particular type and size of fifth wheel that was installed. One of the partners of Utility testified that when the fifth wheel was ordered he knew for what purpose and use it was intended.

Austin is a Michigan corporation that manufactured the wheel in question. It has manufactured the particular model involved since 1932. Utility was not the agent of Austin. Austin sold the fifth wheel to Utility in the ordinary course of business, and title to the wheel was in Utility before the sale to plaintiff. The bearings of the fifth wheel were manufactured for Austin by the Albion Malleable Iron Company of Michigan according to specifications prepared by Austin.

Plaintiff accepted delivery of the tractor and semi-trailer and started to use it in his trucking business. Between February and August 16, 1946, the equipment was driven a little less than 30,000 miles, the last two months by Pearson, a truck driver with some seventeen years' experience who had worked for plaintiff for about a year. On August 16, 1946, plaintiff received an order to transport 1,400 lugs of pears from Lake County to Los Angeles. This was a normal load. Plaintiff dispatched Pearson to take care of the order. Pearson testified that he checked the equipment before starting on the trip, including a check of the brakes and of the fifth wheel to see that it was locked. He picked up his load in Lake County and started towards San Francisco. The pears were properly loaded in the semi-trailer. Pearson had proceeded about fourteen miles on his return trip when the accident occurred. At that time he was proceeding on an uphill winding two-lane highway, which was about twenty feet wide with a four-foot shoulder. The surface of the road was oil gravel and the day was sunny. While travelling around a sharp left turn Pearson sensed that the equipment was not steering properly. He looked back at the semi-trailer and discovered that it was "climbing" towards the cab of the tractor, apparently because the semi-trailer had fallen onto the wheels of the tractor. The semi-trailer came forward and hit the right side of the cab of the tractor which was pushed forward almost against the dashboard. Pearson stopped, and the semi-trailer fell against an embankment. Pearson could not remember whether he had put on the brakes when he first observed what was happening. The tractor was equipped with a governor on each gear. Prior to the accident Pearson had been in low gear and had just shifted to the next higher gear when he noticed something wrong. The maximum speed that he could have been going in low gear was 19 miles per hour, while the maximum speed he could have been travelling in the next highest gear was 22 or 23 miles per hour. After he stopped, and after he alighted from the tractor, the equipment was hit by another vehicle. Pearson was charged by the highway patrol with speeding, and the court's docket indicates that he pleaded guilty and was fined $25. He testified, however, that he did not plead guilty but that the fine was a compromise and was paid so that he would not have to lose time from his work by appearing for trial.

A state highway patrolman, Burriss by name, investigated the accident. A portion of his deposition was read into the record at the trial. He testified that after the accident there were skid marks extending back from where the equipment came to rest; that, based upon his examination of these skid marks, he estimated that the semi-trailer broke loose from the tractor 80 or 90 feet back from where the equipment stopped; that these skid marks were not brake skids but side skids; that the cross members of the semi-trailer could not have fallen on the wheels of the tractor until the fifth wheel had broken. He observed, after the accident, that there were two broken bearings.

Artal, a tow truck operator, testified that after the accident a portion of the fifth wheel normally attached to the tractor was hanging from the king pin of the semi-trailer, and that the bearings had broken.

Schroeder, a mechanic employed by plaintiff, testified that it was his duty to and that he did check each piece of equipment operated by plaintiff after every trip; that this was done never less than once a week; that the checking included tightening of the bolts on the fifth wheel, checking and adjusting the brakes and the greasing of the equipment; that as to the particular unit here involved he gave it a routine but not a complete checkup the day before the accident, but that within a month prior to the accident he had given it a complete check; that he visited the scene of the accident before the equipment was removed and observed the broken bearings; that portions of the bearings that should have been on the tractor were hanging from the pin of the trailer, and a broken piece was lying on the plate of the fifth wheel; that he picked up one of the portions of the broken bearing and observed along the line of the new break a "bubble formation"; that the line of the break "was not broken clean across; there was like a little hollow spot in it" in the center of the fracture between an eighth or a quarter of an inch in width; that the hollow spot was of a different color than the rest of the metal, being "a blackish color." Schroeder showed the broken piece of the bearing to Pearson, the driver, who also testified as to this "bubble" and the discoloration within the line of the new break. This portion of the bearing was lost during the period the equipment was being repaired and so, of course, was not produced at the trial. There was no corresponding discoloration on the piece of the bearing that was still attached to the equipment.

The bearings involved were made of malleable iron. Both sides produced expert testimony as to the chemical, metallurgical and physical characteristics of the castings. Plaintiff called Anderson, a chemist, who had analyzed drillings from the portions of the bearings available. He testified that from his chemical examination the bearings demonstrated that they had a high sulphur content "showing the castings to be of inferior quality"; that, according to the standard authorities, the sulphur content should not exceed .12, while a good quality casting should not have over .07 sulphur. His tests showed that the broken bearing or bracket had a sulphur content of .203 in one bracket and .205 in the other. Too much sulphur, according to the witness, "gives general weakness to the casting" and "tends towards brittleness. * * * It interferes with the annealing properties of the metal. His tests were chemical only, and he admitted that physical and use tests would show other qualities of the metal. High sulphur content indicates only that the material was inferior, it does not indicate, necessarily, the strength of the material. This can only be ascertained by field tests.

The witness Clark was also a chemist called by plaintiff. He too made chemical tests of the bearings and found, in two tests, a sulphur content of .196 and .198, while the maximum specification of the A. S. T. M. (American Society for Testing Materials) was .12. He too agreed that a high sulphur content had a tendency to create brittleness. He made no physical tests and did not know the tensile strength, yield point or elongation per cent of the bearings. Physical or field tests would demonstrate the ductility of the metal and he had not made these. Although the fact that the bearings broke in use was a sort of field test, Clark would not state that there was too much sulphur in the bearings for the purpose for which they were intended.

Defendants also produced certain experts. Morse, a metallurgical engineer, was called by Austin. He pointed out that the A. S. T. M. figures were recommendations and not requirements, and that other recognized authorities recommended that the sulphur content of malleable iron should be less than .25 per cent, and that these samples had .203 and .205 of sulphur. It was his view that brittleness could not be determined from chemical tests, and that physical tests were required. It was also his opinion that the fractures of the castings here involved were normal for ductile malleable castings; that if there had been a hollow spot, which he called a "blowhole," in the piece of the casting as testified to by Schroeder, it would show up in the mate of that broken piece, but there was no indication of such in the pieces of the bearings before the court. Morse gave it as his opinion that the castings were not brittle, had normal ductility, and were normal iron castings. In his opinion, the bearings did not have an unusually high sulphur content.

Austin also produced Dorn, a professor of physical metallurgy at the University of California, who had made certain physical tests of the pieces of the bearings before the court. He found that the shear strength of one bearing was 47,236 pounds per square inch, which he stated was normal for sound malleable iron, and the tensile strength of the same specimen he found to be 59,950 pounds per square inch, which is within the specifications recommended by A. S. T. M. A flange from one of the bearings was tested and found to have a shear strength of 44,820 pounds per square inch, which appeared to him to be a safe value, while the tensile strength of this sample was 54,340 pounds per square inch. The elongation of the sample was 15 per cent, which he stated to be within the specifications for malleable iron of A. S. T. M. He admitted that the various properties of a casting vary from point to point within a particular casting. He believed that malleable iron was a proper material to use for the brackets in question, and that they were not brittle. In reference to the "bubble," he testified that if it appeared on one-half of a fractured piece it would "usually" appear on the other half. Later he was more positive, stating that it "must be on the other portion," and there were no indications on the piece of the broken bearings before the court of any such "bubble."

The evidence shows that from February to August, 1946, the equipment had been in constant use hauling loads of 30,000 to 40,000 pounds over all kinds of roads. The speedometer on the tractor showed that it had travelled 29,648 miles. The load of pears being hauled at the time of the accident weighed 42,000 pounds. This would mean that the fifth wheel was then carrying 25,000 pounds. Seyferth, a vice-president of Austin, testified that the fifth wheel was designed to carry 40,000 pounds static weight—a non-moving dead weight—with a safety factor up to 200,000 pounds. The wheel was designed to stand the effects of jack-knifing and sudden stopping. Durrell, of Utility, testified that under the worst conditions a fifth wheel should operate 25 to 30,000 miles without maintenance. With proper maintenance, and there was substantial evidence of such maintenance here, the wheel should go 100 to 125,000 miles without replacing the rubber bushings.

The bearings were made by the Albion Malleable Iron Company according to specification and design furnished by Austin. Austin drilled the castings at its factory. Seyferth testified that Albion made physical tensile tests of samples from each "heat" or batch of bearings to ascertain that the bearings had a tensile strength of 50,000 pounds per square inch, which was the minimum specification of Austin. Austin also made tensile strength tests of bearings selected at random. In addition, the machinists who drilled the holes in the bearings at the Austin factory inspected the holes and the drillings for any defects that would be apparent to the eye. A second machinist makes a similar inspection, and so does a line inspector. After the fifth wheel is assembled, a final inspection of the fifth wheel is made. Austin makes no chemical tests.

There is substantial, although conflicting, testimony that plaintiff relied on Utility to select the make and type of fifth wheel. Utility admittedly knew the purpose and intended use of the wheel. Durrell, one of the partners of Utility, testified that, in the past, the plaintiff on three or four occasions had specified that Austin fifth wheels be installed, and that, since the accident, plaintiff had ordered by name at least two fifth wheels. This testimony was specifically denied by plaintiff who stated that he had never told Utility a specific make of fifth wheel to install either before or after the accident. As to the purchase of the particular fifth wheel here involved the written order taken by Durrell does not mention an Austin installation, nor does the statement rendered by Utility to plaintiff mention an Austin fifth wheel. A repair order does mention Austin, but that was apparently written in by an employee of Utility.

The Appeal of Utility.

This appellant is the seller of the fifth wheel. It appeals from the judgment and from the order denying its motion for judgment notwithstanding the verdict. It was held liable on the theory of breach of an implied warranty of fitness for a particular purpose. This warranty is part of the Uniform Sales Act and is embodied in section 1735 of the Civil Code, which reads, in part, as follows:

> "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:
>
> "(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

[1, 2] The evidence supports the implied finding of the jury that there was a breach of this implied warranty. This appellant analyzes the expert testimony and comes to the conclusion that there is no basis for the jury's award other than mere surmise, guess or conjecture. It points out that its experts testified that the bearings had good ductility, while plaintiff's testimony, at most, showed that the castings might be brittle. Although it does not so state in express terms, it seems to be the thought of this appellant that, before it can be held liable on the warranty, the plaintiff must show, in some way, some act of negligence on its part that contributed to the accident. At one place Utility directly states that "If the evidence does not justify a verdict against the manufacturer for the reason stated, then there is no justification for the verdict against the seller." Utility's Op.Br. p. 17. Utility misconceives the law. The manufacturer's liability is based on negligence, but that of the seller is predicated upon warranty. Negligence is no part of the warranty cause of action. In Vaccarezza v. Sanguinetti, 71 Cal.App.2d 687, 689, 163 P.2d 470, 472, this court, in speaking of a cause of action based on section 1735 of the Civil Code, stated: "The action is not based upon the negligence of defendants but upon breach of the implied warranty of fitness for the purpose for which purchased. Section 1735 of the Civil Code. The section imposes an absolute liability regardless of negligence. [Citing authorities.]" Whether the plaintiff proved that the fifth wheel was defectively manufactured or not is immaterial, if in fact he offered evidence that it was not reasonably fit for the purpose for which it was sold. The seller knew the purpose for which the fifth wheel was required. As already pointed out, the evidence supports the implied finding that the plaintiff relied on the seller's skill and judgment to select and to install a fifth wheel that would fill the desired purpose. Although the evidence is conflicting, there is substantial evidence that the fifth wheel failed in normal use. There is substantial evidence that the fifth wheel was properly serviced and maintained by plaintiff. This evidence, without proof of the cause of the failure, sustains the finding of the jury that there was a breach of the warranty.

[3] Utility argues at some length that the evidence does not show that the failure of the bearings was the proximate cause of the accident. This was a question of fact for the jury. As this court recently stated in another fifth wheel case: "It is elementary law that on such an appeal this court cannot disturb a finding of fact unless there is no evidence or no reasonable inference from the evidence to sustain that finding. [Citing cases.] The above rule applies to a finding of proximate causation."

Oregon-Nevada-California Fast Freight v. Fruehauf Trailer Co., 83 Cal.App.2d 620, 624, 189 P.2d 329, 331.

There is substantial evidence that the fifth wheel broke some 80 or 90 feet before the equipment smashed into the embankment. Although there is evidence from which it might be inferred that some other factor than failure of the fifth wheel in normal use—such as the driving of plaintiff's driver—caused the accident, there is substantial evidence from which it may be inferred that the breaking of the wheel in normal use caused the accident. This being so, the implied finding of the jury on proximate cause cannot be disturbed.

[4] Utility also argues that there is no evidence that the fifth wheel was not reasonably fit for the use intended. This was a question of fact. While the seller does not warrant absolute safety, he does warrant that the article is reasonably fit for the purpose intended. When a mechanical device fails in normal use and has been properly maintained, that is a field test that supports the implied finding of the jury that it was not reasonably fit for the purpose intended. The testimony of the experts as to tests made by them merely creates a conflict.

[5] Utility also contends that there was no evidence of a latent defect. Even if such evidence were necessary to show breach of warranty (and such evidence is not necessary), there is ample evidence to show that the castings had too high a sulphur content, which would have a tendency to make them brittle, and there is substantial evidence of the "bubble" in the fracture line of one of the broken bearings.

[6] It is next apparently urged that, in the absence of knowledge on the part of the seller of a latent defect, the seller, who is not the manufacturer, is not liable for damage caused by a latent defect. In this connection Tourte v. Horton Mfg. Co., 108 Cal.App. 22, 200 P. 919 is cited. That case undoubtedly held that a seller who was not a manufacturer was not liable for a latent defect, at least where the buyer had knowledge of the defect. That case was decided under the law as it existed prior to the adoption of the Uniform Sales Act in this state. While there are a few cases that hold that it was not the intention of the Sales Act to make a seller who is not the manufacturer liable for damages caused by a latent defect, see United States Fidelity & Guaranty Co. v. Western Iron Stores Co., 196 Wis. 339, 220 N.W. 192, 59 A.L.R. 1232, the substantial weight of authority is to the effect that, under the Uniform Sales Act, the implied warranty extends to latent defects. See annotation 59 A.L.R. 1235; see discussion 21 Ind. Law Journal 231; see Wasserstrom v. Cohen, Frank & Co., 165 App.Div. 171, 150 N.Y.S. 638. This appeals to us as sound law.

[7] Utility next urges that where the buyer and seller have equal skill, and equal opportunity to inform themselves of the defect, no inference of reliance will arise. The cases cited are all cases where the issue was whether the buyer relied on the seller, or exercised an independent judgment. Where the defect is latent and where, as here, there is evidence that the seller knew the purposes for which the fifth wheel was wanted, and evidence that the buyer relied on the seller to supply a fifth wheel that would perform that function, the parties are not on an equal footing, because in such a situation section 1735 of the Civil Code imposes against the seller a warranty, even against latent defects.

We therefore conclude that the trial court correctly denied the motion of this appellant for judgment notwithstanding the verdict. It is also clear that the implied finding of the jury that Utility breached the implied warranty of fitness for a particular purpose is amply supported. The question of the propriety of the amount of the award will be discussed later, because the issue of damages is common to all appeals.

The Appeals of Tremeroli and Austin.

Austin is the manufacturer. Its liability, if any, is dependent on negligence. It appeals from the order denying its motion for judgment notwithstanding the verdict, and is also the respondent on plaintiff's appeal from the order granting it a new trial.

[8-12] The fact that the trial court granted Austin a new trial on the ground of insufficiency of the evidence does not determine that the trial court should have granted the motion for judgment notwithstanding the verdict. Different principles govern these motions. Austin is entitled to a judgment notwithstanding the verdict only if there is no conflict in the evidence on the issue of negligence. If there is a conflict, the motion was properly denied. On the other hand, the plaintiff is entitled to a reversal of the order granting Austin a new trial on the ground of insufficiency of the evidence only if the evidence without conflict shows that Austin was negligent. If there is a conflict on the issue it was within the power of the trial court to grant a new trial on the ground stated. Estate of Green, 25 Cal.2d 535, 154 P.2d 692, states both rules. At page 542 of 25 Cal.2d, at page 696 of 154 P.2d it states the rule applicable to appeals from an order granting a new trial on insufficiency of the evidence by quoting from Hames v. Rust, 14 Cal.2d 119, 124, 92 P.2d 1010, as follows: "'When the motion is granted, as here, for insufficiency of the evidence, it is only in rare cases showing abuse of discretion that an appellate court will interfere because the trial judge must weigh all the evidence and determine the just conclusion to be drawn therefrom. [Citing a case.] It cannot be held that a trial court has abused its discretion where there is a conflict in the evidence or where there is any evidence which would support a judgment in favor of the moving party.'" See, also, Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689.

[13] At page 546 of 25 Cal.2d, at page 698 of 154 P.2d, Estate of Green, the court states the rule applicable to an appeal from an order denying a judgment notwithstanding the verdict by quoting the following from Card v. Boms, 210 Cal. 200, 202, 291 P. 190: "'The right of the trial court to set aside a verdict and enter a contrary judgment is absolutely the same as its right to grant a nonsuit. [Citing authorities.] The court should therefore grant such a motion when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff. [Citing authorities.]' * * * It is true the court held that the evidence was insufficient to support the verdict of the jury and that a new trial should be granted, but even though the court might be justified in granting a new trial, it would not be justified in directing a verdict or in granting a motion for judgment notwithstanding the verdict."

[14, 15] Thus, it is apparent that if there was a conflict in the evidence on the issue of Austin's negligence, there is no merit in either of the appeals now under consideration. It is, of course, the law that, although a manufacturer who is not the seller to the consumer is not liable to the consumer in warranty, it is liable for its negligence. Privity is no longer required. Sheward v. Virtue, 20 Cal.2d 410, 126 P.2d 345, and cases therein cited. At page 412, of 20 Cal.2d, at page 345 of 126 P.2d appears the following: "No serious contention may be made by Virtue Brothers that they did not owe a duty of care toward the plaintiff in the manufacture of the chair because privity of contract between them was absent. The courts of this state are committed to the doctrine that the duty of care exists in the absence of privity of contract not only where the article manufactured is inherently dangerous but also where it is reasonably certain, if negligently manufactured or constructed, to place life and limb in peril. [Citing cases.]"

[16] The evidence on the issue under consideration has already been summarized. We think that the evidence and the reasonable inferences therefrom would support a finding either way on this issue. There is expert evidence that the broken fifth wheel had a high sulphur content in excess of the amount recommended for

such castings. There is evidence that such an amount of sulphur would tend to make the casting brittle. Austin's experts made certain physical tests and testified that the castings were of normal strength for the use intended. Whether a high sulphur content causes brittleness, and whether these castings were brittle, were subjects on which the evidence and the reasonable inferences therefrom were in conflict. There was also evidence given by two witnesses for plaintiff that there was a "bubble" in one part of the broken casting along the line of the break. If such "bubble" existed, it showed negligence in the manufacturing process. Although the experts called by Austin and Utility doubted the existence of this "bubble," and could not explain it, that merely created a conflict. The evidence of Austin as to the tests made during and after manufacture is not conclusive. Under the circumstances it was for the jury to determine this issue, or for the trial court on motion for new trial. The evidence and the reasonable inferences therefrom are in conflict.

Plaintiff places considerable reliance on the case of Oregon-Nevada-California Fast Freight v. Fruehauf Trailer Co., 83 Cal.App.2d 620, 189 P.2d 329. That is a case involving the failure of a fifth wheel. It is an action by the buyer against the manufacturer. The appeal was by the manufacturer from a judgment against it. The evidence was conflicting as to whether a key weld was strong or weak. In sustaining the judgment in favor of the plaintiff this court stated, 83 Cal.App. at page 624, 189 P.2d at page 331: "It is elementary law that on such an appeal this court cannot disturb a finding of fact unless there is no evidence or no reasonable inference from the evidence to sustain that finding. [Citing cases.] The above rule applies to a finding of proximate causation." This case would be in point had the trial court denied the motion for a new trial, and had Austin then appealed from the judgment. It is not in point here where the trial court has granted the motion for a new trial.

[17] The trial court correctly denied the motion for judgment notwithstanding the verdict, and acted within its powers in granting Austin's motion for a new trial on the ground of insufficiency of the evidence.

The Issue of Damages.

This issue presents the most troublesome problem involved on these appeals. The jury verdicts against Utility and Austin were for $12,500. Both contend that the damages awarded are excessive and not supported by the evidence. While the judgment against Austin has been set aside, in view of the new trial it has a direct interest on this damage issue.

The measure of damages for breach of warranty is set forth in section 1789(6) of the Civil Code. It provides that: "The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events from the breach of warranty." In tort actions, generally, section 3333 of the Civil Code provides that the measure of damages "is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." For the purposes of this action no substantial differences exist between these sections, and the parties stipulated that the measure of damages in the negligence and in the breach of warranty actions were identical.

[18, 19] The burden of proof, of course, is on the plaintiff to prove his damages with reasonable certainty. In this type of action cost of repairs, other costs caused by the injury, loss of profits, cost of rental of substitute equipment and similar charges are the normal items of damage.

The plaintiff proved that, as a result of the accident, he incurred the following direct charges:

Repairs to tractor	$2,063.67
Repairs to semi-trailer	2,429.52
Paid for cargo loss	746.34
Towing charges	381.27
Salvage labor costs	66.75
Flagman at accident	82.50
Total	$5,770.05

These items were directly and proximately caused by the accident and are clearly recoverable. No contention is made to the contrary.

[20] In partial support of the balance of the award, plaintiff refers to certain cancelled checks introduced by him totalling $4,305.02, which represent sums paid by him to subhaulers to carry out contracts he was unable to fulfill because of the damage to his equipment. Plaintiff further testified that his customers paid him the contract price for these hauls, and that he then remitted these sums to the subhaulers, retaining ten per cent for administrative costs and a further sum for taxes. In other words, plaintiff acted as a conduit for these funds, the customers paying him the contract price, and he remitted these sums less out-of-pocket administrative and tax charges. It seems too clear to require extended discussion that the sums paid to subhaulers did not constitute the damage suffered by plaintiff. The plaintiff is entitled to be placed in the same position, from a monetary standpoint, that he would have been in, had the accident not occurred. He was obligated by contract to carry certain hauls. Had the accident not happened, he would not have made as net profit the amounts that would have been paid to him by his customers. That is a gross figure. In addition to his administrative and tax costs he would have had to pay a truck driver, and other costs of operation of the equipment that was damaged. The difference between what he would have been paid by his customers and his cost of operation is obviously the profit that he would have made. That is what he is entitled to recover so far as this item is concerned. But as to such loss of profits there was no evidence produced at all. In fact, the plaintiff tried to introduce such evidence but the trial court erroneously refused to permit him to testify on this subject. Thus, there is a complete lack of evidence on this item of damage. The payments to the subhaulers did not come out of his pocket at all. If he recovers such sums from the defendants he will be in a better position than he would have been had the accident not occurred.

The conclusion that the $4,305.02 paid to subhaulers cannot support the award here challenged would be perfectly clear were it not for the rules of law announced in such cases as Anheuser-Busch, Inc. v. Starley, 28 Cal.2d 347, 170 P.2d 448, 166 A.L.R. 198, and Gersick v. Shilling, 97 Cal.App.2d 641, 218 P.2d 583. See, also, discussion 15 Am.Jur. p. 615, § 198; 18 A.L.R. 678; Shea v. Rettie, 287 Mass. 454, 194 N.E. 44, 95 A.L.R. 575. Although these authorities are not cited by the parties, they should be mentioned.

These authorities announce the rule that total or partial compensation received by an injured party from a collateral source wholly independent of the wrongdoer will not lessen the damages recoverable from the person causing the injury, apparently because the damages recoverable in tort cases at least are considered as not being solely compensatory but are thought of as being partially punitive. Thus, in the Anheuser-Busch case the cargo being transported by a common carrier was damaged when the carrier was hit by the car of the defendant. Plaintiff sued defendant. The evidence showed that the common carrier had reimbursed the plaintiff for his loss. The Supreme Court held that such payment did not reduce plaintiff's recovery from defendant—it was a recovery from a collateral source wholly independent of the wrongdoer. In the Gersick case it was held that an injured person was entitled to recover the full amount paid a hospital as a result of the accident even though the injured person was fully reimbursed for such expenditures because of an insurance policy for which a premium had been paid. The same rule seems to apply to wages paid an injured person by the employer. The injured employee may still recover the full amount of such wages from the wrongdoer.

The rule of those cases is not applicable here. In those cases the item of damage involved was recoverable *in toto* from the wrongdoer. It was merely a fortuitous circumstance that the injured person received reimbursement from some collateral source. The wrongdoer should not benefit from such a fortuitous circumstance. Here the item of damage recoverable was loss of profits, not the sums paid the subhaulers or the sums received from the customers. There was no evidence of such profits. It is obvious, therefore, that this item of $4,305.02 does not support the award. This loss of profits may be shown on the retrial.

[21, 22] Plaintiff also seeks to support the award, in part, on the theory that he was entitled to recover the reasonable value of the loss sustained by being deprived of the use of his vehicles. In a proper case loss of use is a recoverable item. Valencia v. Shell Oil Co., 23 Cal. 2d 840, 147 P.2d 558. In some cases this may be shown by the reasonable rental value of such equipment whether or not such substitute equipment was in fact rented. Malinson v. Black, 83 Cal.App.2d 375, 188 P.2d 788. In the instant case plaintiff testified that he was unable to rent other equipment, but there was no testimony at all as to what the rental value of such equipment would have been. In every case cited by plaintiff where value of loss of use has been recovered, there was some proof of the value of such loss of use. Such proof is indispensable.

[23] Of course, double recovery cannot be allowed. If, on the retrial, full profits that would have been earned are recovered, that necessarily includes compensation for loss of use. If evidence of profits is not available, loss of use may be shown by what it would have cost to rent comparable equipment. But some proof must be produced on these issues.

As the record now stands, the only damage proved was as to money expended for or incidental to the repairs—$5,770.05. Other damage was undoubtedly suffered by plaintiff but he failed to prove what that damage may have been. The judgment for $12,500 against Utility cannot stand. A new trial as to it on the issue of damages alone should be had.

According to the orders about to be made the cause will have to be retried. As to Utility, liability has already been found to exist and the retrial will be had on the issue of damages alone. As to Austin, both the question of liability and the amount of damage must be retried.

The following orders dispose of the various appeals:

1. The order granting Austin a new trial is affirmed.

2. The appeal of Austin from the order denying its motion for judgment notwithstanding the verdict is dismissed. Goodman v. Atchison, T. & S. F. Ry. Co., 94 Cal.App.2d 745, 211 P.2d 310.

3. The judgment against Utility is reversed and the cause remanded for a new trial as to Utility solely upon the issue of the amount of damages suffered. The trial court is directed, upon the settlement of that issue, to enter judgment in favor of plaintiff and against Utility in the amount so fixed.

4. The order denying the motion of Utility for judgment notwithstanding the verdict is affirmed.

5. All parties to bear their own costs on these appeals.

BRAY and FRED B. WOOD, JJ., concur.

contractor's written commitment to sell at price fixed by an appraisal by Veterans' Administration to determine reasonable value of property and on basis of veteran's ability to pay, but veteran and contractor entered into side agreement for construction of home on cost-plus basis agreement which was to supersede all prior agreements, there was no basis for veteran's asserted claim for reasonable rental value for contractor's alleged failure to complete home on date specified in first agreement. Servicemen's Readjustment Act of 1944, § 501, 38 U.S.C.A. § 694a.

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Geo. L. Hampton, Van Nuys, for appellants.

Ogden, Crocker & Steelman and Samuel Steelman all of Los Angeles, for respondent.

EDMONDS, Justice.

Helen Young, a contractor, sued to enforce a mechanic's lien for the construction of a house for William J. Hampton and Alice C. Hampton. The trial court found that the work had been performed pursuant to a cost-plus agreement, awarded Young a lien for the unpaid balance due under the contract, and directed foreclosure if the debt is not discharged.

According to the settled statement on appeal, the material facts are as follows: William and Alice Hampton discussed with Helen Young the matter of building a house for them. William told her that he is a veteran of World War II. To aid the Hamptons in procuring a veteran's loan, she gave them a letter stating that she would construct for them a dwelling house and garage according to certain plans and specifications for the sum of $8,500. At her direction, the Hamptons presented the letter to a bank and applied for a veteran's loan.

An appraiser appointed by the Veterans Administration appraised the buildings at $8,283. Helen Young told the Hamptons that the house and garage could not be built for that amount, and they verbally agreed to pay her the difference between the cost of construction and the amount of the bank loan. They afterwards executed a contract whereby she agreed to construct the buildings for $8,283 payable in five installments of 20 per cent each.

Soon after the execution of the contract, but before any work upon the buildings was commenced or materials delivered, Helen Young and the Hamptons executed a second agreement, which evidenced their true intentions. By it, the Hamptons agreed to pay her the cost of construction, plus 10 per cent, the total amount not to exceed $9,000. The agreement was to "supersede any and all contracts and agreements made prior" to it, and "all monetary differences between previous contract and this agreement shall and are to be made on or before completion of the above mentioned dwelling and garage".

Neither of the parties disclosed the second agreement to the bank or the Veterans Administration. The Hamptons executed their note, secured by a trust deed, in favor of the bank. At this time, a copy of the first contract was delivered to the bank with the plans and specifications referred to in Miss Young's letter. She applied for and received from the bank the first four payments provided for in the contract upon which the loan had been made. Prior to the date upon which, by that contract, she had obligated herself to complete construction, the Hamptons notified the bank to withhold further payments to her, and she did not receive the fifth installment of the contract price.

The dwelling and garage were not completed until about six months after the date specified in the first contract. Miss Young then commenced the present action, based upon the cost-plus contract, to foreclose a mechanic's lien. The defense of the Hamptons is that the second contract is illegal and contrary to public policy. They cross-complained for the reasonable rental value of the premises for the period between the date of completion and the date upon which the contractor agreed to complete it. She obtained judgment for $2,839 with interest and costs, and these sums were declared to be a lien upon the realty.

Recovery was denied the Hamptons upon their cross-complaint.

Upon their appeal from the judgment and the order denying their motion for a new trial, the Hamptons contend that the cost-plus contract is illegal and cannot be enforced because it is contrary to the provisions of the Servicemen's Readjustment Act (38 U.S.C.A. § 694a). Under that statute, a loan to a veteran for home construction is automatically guaranteed by the federal government "* * * if made pursuant to the provisions of this subchapter including the following:

"(1) That the proceeds of such loan will be used for payment of the property purchased or constructed or improved;

"(2) That the contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or the construction cost bear a proper relation to the veteran's present and anticipated income and expenses; and that the nature and condition of the property is such as to be suitable for dwelling purposes; and

"(3) That the price paid or to be paid by the veteran for such property or for the cost of construction * * * does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator."

Miss Young argues that there is nothing in the statute which renders the contract unlawful. The act, she says, merely states the conditions under which the federal government will guarantee a loan; it does not prohibit a veteran from buying a house for any price he desires to pay for it. She relies upon Bryant v. Stablein, 28 Wash.2d 739, 184 P.2d 45, 50, which concerned a suit for specific performance commenced by the buyers of realty. The seller defended upon the ground that the contract of sale was illegal because of the payment of "side money", alleged to be in violation of the Servicemen's Readjustment Act. The defense was rejected upon two grounds: (1) "Although the act provides, in effect, that loans thereunder are guaranteed only if made pursuant to certain provisions, one of which is that the price to be paid by the veteran for the property shall not exceed the reasonable value thereof as determined by the appraiser, there is no penalty fixed for paying or receiving more than the appraised value. In short, the act relates simply to the conditions under which the government *will guarantee a loan to the veteran* in the first instance, not to contracts pending or concluded between the veteran and third persons." (2) "Furthermore, in the case at bar, when appellants in their answer raised the question of 'illegal money,' respondents, to placate them, at once abandoned the G. I. loan and substituted therefor sufficient other funds to complete the purchase." The decision was cited with approval in Ewing v. Ford, 31 Wash.2d 126, 195 P.2d 650, 655.

Subsequent to these decisions, the United States Court of Appeals determined that the criminal penalties of section 715 of Title 38 U.S.C.A. are applicable to the Servicemen's Readjustment Act. In Young v. United States, 9 Cir., 178 F.2d 78, 79 the plaintiff in the present action and another were convicted for knowingly causing a false certificate to be made concerning a loan to a veteran for the purchase of a home. One count of the indictment concerned the transaction which is the subject of this litigation. Count two charged Miss Young with informing a bank that the amount to be paid by a veteran of World War II for the purchase of a lot and home, "* * * as to which a loan guarantee was being sought from the Government of the United States", included certain amounts required to purchase a lot and construct the house. Further allegations were that Miss Young caused the bank to certify in a Home Loan Report presented to the United States Veterans Administration that the amount to be paid by such veteran to purchase such lot and to construct such house did not exceed the reasonable value thereof of $9,700, as determined by an appraiser designated by the Administrator of Veterans' Affairs. The defendants concealed from the bank and the Veterans Administration, the indictment concluded, that they had obtained from the veteran a contract to pay $2,200 for the lot, and a contract to pay the cost of construction of the house, plus 10 per cent, with a minimum of $8,200, and demanded from the veteran $9,000 for such construction. It was held that Congress had not failed to denounce the act charged in the indictment as a crime, although the transaction is not prohibited by the terms of the Servicemen's Readjustment Act.

In Karrell v. United States, 9 Cir., 181 F.2d 981, the defendant was convicted of a violation of the same statute because of his participation in a transaction designed to obtain a federally guaranteed loan upon property purchased for more than the appraised value. To the same effect is United States v. Oakland, D.C., 81 F.Supp. 343, and United States v. Selph, D.C., 82 F.Supp. 56.

The facts in Diamond v. Willett, La. App., 37 So.2d 338, parallel those in the present action. In that case, a veteran purchased a home from the proceeds of a "G. I. Loan" which had been obtained upon the basis of the vendor's written commitment to sell at a price fixed pursuant to an appraisal by the Veterans Administration. Not being willing to sell the property for the appraised value, the vendor agreed to accept the veteran's note for an additional sum. In a suit upon the note, recovery was denied.

Speaking of the policy of the Servicemen's Readjustment Act, the court said: "The acts of Congress herein referred to are designed to give relief to members of the armed forces, of limited means, who honorably served their country during World War II. It was realized by Congress that no greater duty rested upon it than to aid and encourage, in substantial ways, the establishment of homes by those who had loyally served the Government in its hour of peril. One of the several modes adopted to attain this desired end is reflected from the passage of laws that unequivocally insure against financial loss those persons who invest in notes of ex-service men, secured by mortgages on homes acquired by them. Before said insurance can become effective in any given case, inquiry is made concerning the ability of the ex-service man to repay the mortgage debt, and care is exercised to protect him against the assumption of obligations he might default upon eventually. For this reason, it is imperative that the correct sale price of a home be declared in the application for assistance." 37 So. 2d at page 341.

Analogous cases construe the Home Owners' Loan Act of 1933, and the National Housing Act of 1934. See cases cited in 110 A.L.R. 250; First Federal Sav. & Loan Ass'n, v. Martin, 7 Cir., 97 F.2d 831, 121 A.L.R. 117; McAllister v. Drapeau, 14 Cal.2d 102, 92 P.2d 911, 125 A.L. R. 800. In Adams Co. v. Pacific States Savings & Loan Co., 34 Cal.App.2d 723, 94 P.2d 370, a contract calling for a consideration contrary to the policy of the act was held to be void. McAllister v. Drapeau, 14 Cal.2d 102, 92 P.2d 911, concerned the validity of a second lien made contrary to the policy of the act. The statute did not expressly declare a second lien to be illegal, but the rules and regulations provided that the H. O. L. C. would not refund the first mortgage if the creditor demanded a second lien unless the financial ability of the debtor and the financial arrangements were such that the debtor would have a reasonable opportunity to pay off both mortgages. It was therefore held that "The obtaining of secret second liens by the creditor violates the basic public policy expressed in the act." McAllister v. Drapeau, supra, 14 Cal.2d at page 109, 92 P.2d at page 915.

[1] The policy announced in these decisions of affording the protection of the law to those whom the federal loan statutes are designed to benefit is a sound one and equally applicable to the veteran beneficiary of the Servicemen's Readjustment Act. By section 694a of that statute, the government endeavors to assure terms of payment which bear a proper relation to the veteran's present and anticipated income and expenses. The requirement of the same section that the price to be paid by the veteran for the cost

of construction shall not exceed the reasonable value as established by a designated appraiser was obviously enacted to protect the borrower from acquiring property at an exorbitant price. That this was the legislative intent is manifest from the discussions at the time enactment of the statute was being considered. (Congressional Record, Vol. 90, Pt. 4, p. 4649 [May 12, 1944, to June 12, 1944].)

[2, 3] For the same reasons that a second lien which violates the basic public policy expressed in the Home Owners' Loan Act was held to be void, a contract which is contrary to the policy of the Servicemen's Readjustment Act is also unenforceable. To hold otherwise would invite builders to exact similar secret contracts with the assurance that they would be upheld.

Miss Young contends that there is no evidence of any application for benefits of the act or that the loan made by the bank was guaranteed. Contrary to this contention, the record shows that application was made for a guaranty of the loan in the amount of $4,000. The bank was induced to submit to the Loan Guarantee Division of the Veterans Administration a Home Loan Report, with the veteran's certificate of eligibility and the appraisal report, in which a Loan Guaranty Certificate was requested. Although the report was approved, there is no evidence that the certificate was issued. However, the lack of such evidence is not decisive. The obvious purpose of Miss Young's act was to obtain a higher price for the construction of the Hampton home than that permitted by the Servicemen's Readjustment Act. At the same time, she represented that she would construct the buildings for their appraised value in order that construction might be financed under the act.

[4] Manifestly, the entire transaction was designed to evade the provisions of the act and also to obtain its benefits. The statute was intended solely to aid the veteran in the establishment of a home. Any benefit to a contractor was incidental. However, if a secret contract for an amount in excess of the appraised value may be exacted from a veteran, the purpose of the act is defeated. There is no legal reason why the transaction in the present case, which is plainly contrary to the public policy of the act, is rendered legal merely because it was not entirely successful. The fact that Miss Young's illegal acts were discovered before the Veterans Administration finally approved the transaction does not make the contract valid.

[5, 6] The Hamptons' claim that they are entitled to a judgment for the reasonable rental value of the premises for the period during which completion of the buildings was delayed rests upon a provision of the first contract executed by the parties. But from the findings of the trial court and the Settled Statement on appeal, it appears that none of them intended that contract to be their true agreement. "If either party knows that the other does not intend what his words or other acts express, this knowledge prevents such words or other acts from being operative as an offer or an acceptance." (Rest., Contracts, § 71[c].) There being no operative promise on the part of Helen Young to complete construction on or before any particular date, there is no basis for the asserted claim for reasonable rental value.

The judgment is reversed with directions to the trial court to enter judgment denying Helen Young relief upon the cost-plus contract, and denying the Hamptons any recovery for rent. The appeal from the order denying a new trial is dismissed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice (concurring).

I concur in the judgment of reversal and generally in the views expressed by Mr. Justice EDMONDS in the majority opinion, which views are in accord with those expressed by me in my dissent in the case of Shiver v. Liberty Building-Loan Ass'n, 16 Cal.2d 296, 301, 106 P.2d 4.

36 Cal.2d 788

PRIDONOFF v. BALOKOVICH et al.

L. A. 21512.

Supreme Court of California, in Bank.
March 5, 1951.

Action by Eric L. Pridonoff against Zlatko Balokovich and another for libel. The Superior Court, Los Angeles County, William B. McKesson, J., entered a judgment of dismissal pursuant to an order sustaining without leave to amend defendants' demurrer to amended complaint, and plaintiff appealed. The Supreme Court, Traynor, J., held that newspaper article stating that plaintiff, while member of the American Embassy in Belgrade, was caught carrying on espionage activities, that the United States recalled him upon request of the Yugoslav Government and that plaintiff wrote articles in the United States to stir Yugoslavs to revolt was libelous.

Judgment reversed and cause remanded with directions.

Carter and Schauer, JJ., dissented in part.

Prior opinion 223 P.2d 854.

1. Libel and slander ⚷10(3)

Newspaper article stating that member of American Embassy in Belgrade was caught carrying on espionage activities, that Uuited States recalled him upon request of Yugoslav government and that he wrote articles in the United States to stir Yugoslavs to revolt carried implication that embassy member was unfit for his job as representative of United States serving abroad, tended to injure him in his occupation and hence was libelous. Civ. Code, § 45.

2. Libel and slander ⚷66

Under statute providing that in any action for damages for publication of libel in a newspaper plaintiff shall recover no more than special damages unless correction is demanded and not published, plaintiff could not recover general or exemplary damages arising from publication of libel, in absence of demand for publication of correction and refusal thereof. Civ. Code §§ 45, 48a.

3. Libel and slander ⚷66

The statute providing that in action for damages for publication of libel in a newspaper plaintiff shall recover no more than special damages, unless correction is demanded and not published, applies to action against author of libel, though newspaper was not published by him and statute provides for service of demand for correction upon publisher. Civ. Code, §§ 45, 48a.

4. Libel and slander ⚷66

Special damages arising from publication of libel in a newspaper may be recovered, even though no correction was demanded or refused as provided by statute. Civ. Code, §§ 45, 48a.

5. Libel and slander ⚷89(2)

Where special damages are claimed for injury to plaintiff's trade, profession, or occupation arising from publication of a libel, the nature and extent of the loss must be specifically set forth and general allegation of loss of prospective employment, sale or profit will not suffice. Civ. Code, § 48a.

6. Libel and slander ⚷89(3)

Allegation that as result of alleged libel plaintiff had lost employment with specific employer for specified period, to plaintiff's damage in stated amount, was sufficiently specific. Civ. Code, §§ 45, 48a.

7. Pleading ⚷68

Plaintiff may allege on information and belief any matters that are not within his personal knowledge, if he has information leading him to believe that the allegations are true. Code Civ. Proc. § 446.

8. Libel and slander ⚷89(2)

Special damages by reason of loss of specific employment allegedly due to publication of libel in a newspaper were appropriately alleged on information and belief, since plaintiff would ordinarily learn of such loss of employment from declarations of others. Civ. Code, §§ 45, 48a; Code Civ. Proc. § 446.

◆

Paul Barksdale D'Orr and B. E. Ahlport, Los Angeles, for appellant.

Edward Mosk, Hollywood, Pacht, Tannenbaum & Ross, Clore Warne and Stuart Kadison, Beverly Hills, for respondents.

TRAYNOR, Justice.

Plaintiff appeals from a judgment of dismissal of his action for libel, entered pursuant to an order sustaining without leave to amend defendants' demurrer to his third amended complaint.

Plaintiff alleged in his complaint that "defendants together composed, wrote and caused to be printed and published, of and concerning the plaintiff, in a daily newspaper known as 'Narodni Glasnik,' and distributed to, and which was read by, large numbers of people in the County of Los Angeles, and in other parts of the State of California, and numerous other cities and counties throughout the United States, the following matter:

" 'Eric Pridonoff, while one of the American Embassy in Belgrade, was caught carrying on flagrant espionage activities. The Yugoslav government requested his recall and we recalled him. When Pridonoff got back to the United States, he wrote a series of articles for the Hearst press violently attacking the Yugoslav government and intimating clearly that if the Yugoslav people would revolt against their government, we would help them. These articles were mineographed both in English and Serbo-Croatian, and distributed through the American Reading Room in Belgrade. We read them ourselves while we were there.' "

In the first count of his complaint plaintiff alleged that defendants wrote and published the allegedly libelous article, that all the statements therein, with the exception of the statement that plaintiff was a member of the American Embassy, were false, that defendants knew the statements were false and caused their publication out of malice and ill will toward plaintiff with intention to injure, disgrace, and defame him, and that as a result of the publication of the statements plaintiff suffered general damages in the amount of $100,000. In the second count plaintiff alleged that because of certain circumstances the statements were given a particularly defamatory interpretation by the persons who read them. It was further alleged that plaintiff "is informed and believes and therefore alleges that as a direct and proximate result of said false and malicious publication, and its consequent injury to his reputation as a man, and as a consulting engineer, he suffered special damages in this, that he lost employment, between July 1, 1947, and February 1, 1948, as an engineer with Parsons Aerojet Company, of Los Angeles, California, and compensation $5,000." Plaintiff prayed for judgment in the amounts of $100,000 general damages, $100,000 exemplary damages, and $5,000 special damages.

[1] Libel is defined as "a false and unprivileged publication by writing * * * which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Civil Code § 45. Defendants contend that the article was not libelous in describing plaintiff as being engaged in espionage for the United States; that it is proper and praise-worthy for a person to be a spy for his own country. Had the article said only that plaintiff was engaged in espionage for the United States, defendants' contention might have merit. The article went further, however. It described plaintiff as one of the American Embassy, a person who should not engage in espionage, and charged that nevertheless he engaged in such flagrant espionage activity that his recall was requested and that the United States honored the request. The publication thus carried the clear implication that plaintiff was unfit for his job as a representative of the United States serving abroad. It had a direct tendency to injure him in his occupation and was accordingly libelous.

[2] Plaintiff cannot recover general or exemplary damages, however. Civil Code section 48a provides: "In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying

the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous."

[3] The plain language of the statute governs "*any* action for damages for the publication of a libel *in* a newspaper." (Italics added.) Even though plaintiff's action is for the publication of a libel in a newspaper, he contends that by virtue of the provision requiring service of the demand for correction on the publisher the statute applies only to the publisher and not to his employees, columnists, and other authors. See, Comer v. Louisville & N. Railroad Co., 151 Ala. 622, 44 So. 676, 677. Since his action is against the authors of the alleged libel and not against the newspaper publisher he concludes that section 48a has no application. It does not follow, however, that because the person upon whom the notice to retract must be served is the publisher of the newspaper, the statute applies to him alone. Reporters, columnists, authors, critics, editors, and the publisher are all participants in newspaper publications. When error is made, however, it is the publisher who has power to make correction. In providing for the substitution of a retraction for general and exemplary damages it was reasonable, therefore, for the Legislature to provide that the notice should be served upon him. The retraction provides as adequate a substitute for general and exemplary damages in the case of a suit against the author as in one against the newspaper publisher himself. Since plaintiff does not allege a demand for the publication of a correction or the refusal thereof, section 48a precludes recovery of general or exemplary damages arising from the publication of the alleged libel. Werner v. Southern California Associated Newspapers, 35 Cal. 2d 121, 216 P.2d 825, 13 A.L.R.2d 252.

[4] Plaintiff does allege, however, that he has suffered special damages as a result of the publication of the alleged libel. Section 48a permits their recovery even though no correction has been demanded or refused. The general demurrer was therefore properly sustained only if the allegation of special damages is insufficient to sustain a cause of action therefor.

[5] Special damages are "all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other." Civil Code § 48a. If special damages are claimed, as in the present case, for injury to the plaintiff's trade, profession, or occupation, the nature and extent of the loss must be specifically set forth. "To prevent a surprise on the defendant, it is the general rule that the plaintiff must state in his complaint the particular damage which he has sustained, or he will not be permitted to give evidence of it." Skaggs v. Wiley, 108 Cal. App. 429, 434, 292 P. 132, 134; Peabody v. Barham, 52 Cal.App.2d 581, 585, 126 P.2d 668; Lejeune v. General Petroleum Co., 128 Cal.App. 404, 418–419, 18 P.2d 429. A general allegation of the loss of a prospective employment, sale, or profit will not suffice. Peabody v. Barham, supra; Wilson v. Dubois, 35 Minn. 471, 473–474, 29 N.W. 68; Denney v. Northwestern Credit Ass'n, 55 Wash. 331, 333, 104 P. 769, 25 L.R.A., N.S., 1021; De Witt v. Scarlett, 113 Md. 47, 51–52, 77 A. 271; Tower v. Crosby, 214 App.Div. 392, 212 N.Y.S. 219, 220; Pollard v. Lyon, 91 U.S. 225, 237, 23 L.Ed. 308.

[6] Plaintiff's allegation of special damage is sufficiently specific. He alleges that as a result of the publication of the alleged libel he has lost employment with a specific employer, the Parsons Aerojet Company, for a specified period, to his damage in the amount of $5,000. Defendants are thereby informed of the exact nature of the claim of special damages and afforded an opportunity to prepare a defense against it. That is all that is required of the allegation.

[7, 8] Defendants contend, however, that the allegation is insufficient for the reason that the special damages are al-

leged only on information and belief. Plaintiff may allege on information and belief any matters that are not within his personal knowledge, if he has information leading him to believe that the allegations are true. Code of Civil Procedure § 446; Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 206, 92 P. 184; North v. Cecil B. DeMille Productions, 2 Cal.2d 55, 58–59, 39 P.2d 199; Swars v. Council of City of Vallejo, 64 Cal.App.2d 858, 865, 149 P.2d 397; Thompson v. Sutton, 50 Cal.App. 2d 272, 279, 122 P.2d 975. Plaintiff would ordinarily learn that he lost employment because of the libel from the declarations of others. It is therefore appropriate for him to allege such matters on information and belief. Campbell-Kawannanakoa **v.** Campbell, supra.

Hall v. James, 79 Cal.App. 433, 435–436, 249 P. 876, does not compel a contrary result. In that case the court held insufficient an allegation on information and belief of the amount of damages sustained by plaintiff as the result of defendant's breach of contract. The court recognized that matters that are not within the personal knowledge of the pleader may be alleged on information and belief, but stated that "plaintiff is certainly in a position to know better than any informant the financial loss he sustained by reason of the breach of the contract." Hall v. James, 79 Cal.App. at page 436, 249 P. at page 877. In the present case, the amount of financial loss plaintiff has sustained and the fact that the loss was caused by the libel are not necessarily within his personal knowledge, but may be ascertainable only from the declarations of others and may therefore be alleged on information and belief.

The judgment is reversed and the cause remanded with directions to overrule the demurrer and to allow defendants to answer.

GIBSON, C. J., and EDMONDS and SPENCE, JJ., concur.

CARTER, Justice (concurring and dissenting).

I concur in the reversal of the judgment of dismissal, but do not agree with the law stated in the majority opinion. The majority decision holds that, by implication at least, § 48a of the Civil Code is valid and that it applies to the author of a newspaper article although he has no connection with the newspaper or its publisher; that is, that unless a correction or retraction is demanded and refused, only special damages may be recovered against the author for the publication of a libelous article in a newspaper. I cannot agree with that proposition for two reasons: (1) Section 48a, which grants to newspapers immunity from liability for libelous publications, is invalid, and its invalidity is brought into sharp focus when it is extended to the author of the libelous article. (2) Section 48a does not apply to authors.

The validity of § 48a has been before this court heretofore. Werner v. Southern California Associated Newspapers, 35 Cal.2d 121, 216 P.2d 825, 13 A.L.R.2d 252. I filed a dissenting opinion in that case, and the Supreme Court of the United States allowed an appeal, but a settlement was made of plaintiff's claim and the appeal has been dismissed. I adhere to the views expressed in my dissent in the Werner case, but it is apparent that the broadened scope now given to § 48a by the majority opinion in this case emphasizes its unconstitutionality and calls for further discussion. Under the construction now given to § 48a, a correction or retraction would have to be demanded of an author of an article if it appeared in a newspaper, but if the identical statements appeared in an article published in a magazine or in pamphlet form there would be no immunity. By what legerdemain is an author immunized from general and exemplary damages when his libelous article is published in a newspaper, but is not so immunized when such article is published in a magazine, pamphlet or other form of publication. What possible basis could exist for so classifying authors of libelous articles? These questions are not answered in the majority opinion.

In holding there was no denial of equal protection, the majority said in the Werner case, 35 Cal.2d at page 132, 216 P.2d at page 832: "The Legislature could reasonably conclude that defamation suits against *newspapers* and radio *stations* constituted the most conspicuous example of the danger it sought to preclude. It is not prohibited by the equal protection clause from striking the evil where it is felt most. * * * Similarly in this case, we cannot say that the Legislature could not reasonably conclude that because of the *business* they are engaged in, *newspapers* and radio *stations* are the most frequent *objects* of defamation actions and that the danger of excessive damages in actions against *them* is greatest because of *their* reputed ability to pay. See, Morris, Inadvertent Newspaper Libel and Retraction, 32 Ill.L.Rev. 36, 43; cf., Packard v. Moore, 9 Cal.2d 571, 578–580, 71 P.2d 922, discussing rule of inadmissibility of evidence that defendant is insured in personal injury actions.

"Moreover, in balancing the danger of recoveries of excessive general damages against leaving plaintiffs with no effective remedy for injury to their reputations, the Legislature could properly take into consideration the fact that a retraction *widely circulated by a newspaper* or radio *station* would have greater effectiveness than a retraction by an *individual* and could thus class newspapers and radio stations apart. * * *

"Section 48a may also be sustained under the equal protection clause on the theory that its purpose is to encourage the dissemination of news. Although it extends its protection to those who may deliberately and maliciously disseminate libels, and Legislature could reasonably conclude that it was necessary to go so far effectively to protect those who in good faith and without malice inadvertently *publish* defamatory statements." (Emphasis added.) Thus it is seen that several things are stressed as a basis for the classification approved by the majority in the Werner case—the legislature could decide that unfounded suits against *newspapers,* that is, the *entity or publisher* thereof, are of more frequent occurrence with the possible evil of their being mulcted for excessive damages because of their reputed wealth. But, here we do not have a suit against a newspaper as such, or the publisher. It is against an individual—the *author* of the libel. Merely because of the circumstance that may have caused it to reach the pages of a newspaper instead of a magazine or pamphlet is not justification for exonerating the author. Authors do not fall in the class of newspapers—publishers who are said to be conspicuously subject to unfounded suits. Hence the classification cannot be justified as to authors on that ground. Furthermore, as seen from the foregoing quotation from the majority opinion in the Werner case, it is also said that the Legislature could find that those *engaged* in the *"business"* of operating *newspapers* are the most common objects of defamation actions because of their reputed ability to pay. Manifestly that reasoning cannot apply to authors, and it also indicates (later discussed) the inapplicability of § 48a to authors. They are not in the newspaper business and their work might appear in a newspaper even without their knowledge. It is also said in the quotation from the Werner case, supra, that *newspapers* are more widely circulated and thus a retraction would be more effective. An author as such has no circulating medium, for he publishes nothing, and a demand upon him to make a retraction would be idle, for he could not compel the newspaper to publish it and he has no medium in which to publish it himself. Finally, it is said that the classification should extend to those who inadvertently *publish* defamatory statements to accomplish their objective in the dissemination of news. An author is not disseminating news. He is not operating a newspaper with the accompanying necessity of speed in bringing news to the attention of the public.

It should be clear, therefore, that none of the reasons for the approval of the classification sanctioned in the Werner case fit the author of the defamatory statements here involved. All of those reasons are pertinent only to the *newspaper business*—a publisher. They do not justify a different liability merely because the defamation *appears* in a newspaper regardless of who prepared it. The ramifications arising from a contrary view are disturbingly many. An advertiser, a writer of a letter, a columnist and similar contributors to newspapers would thus have their liability restricted to special damages.

The Legislature did not intend by § 48a to extend protection against actions for libel beyond the publisher of a newspaper. It will be remembered from the wording of the section that a publication of a libel "in" a newspaper is covered. That might indicate that the only requirement was that it appear in a newspaper, but "in" may be used in the sense of "by." Beatty v. Hughes, 61 Cal.App.2d 489, 143 P.2d 110. Thus the publication must be by a newspaper to come within the section and the other provisions of the section make that conclusion inescapable. A correction or retraction must be demanded of the publisher and refused to authorize the recovery of general damages. Upon whom is the demand made? The *publisher*. Where? At the *place of publication*. Plainly, the publisher is the operator of the newspaper. He is not necessarily the author. The author may not be in the publishing business. He does not necessarily have a *place* of publication. If "publish" is given a broad connotation to mean any place the libel is circulated, it would be impossible for the defamed person to know where or upon whom he had to serve his demand. Neither the newspaper operator nor the author would be in all places the paper was circulated. It can only mean, therefore, that the publisher is the operator of the newspaper and the place of publication is the site where it is produced. Moreover, the retraction must be published in a regular issue of the paper. Only the publisher issues regular editions. It would avail him nothing to make a demand on the author, as he could not compel a retraction by the paper. Suppose the newspaper is published out of this state and where no correction or retraction is required, but the author resides in this state. Must a retraction be demanded before suit against the author?

Comer v. Louisville & N. R. Co., 151 Ala., 622, 44 So. 676, is precisely in point. There the statute was similar to our § 48a, and the defendant had prepared an article which he paid the newspaper to publish. It was held that the statute did not apply to such person, the court saying: "* * * we are left to the wording of the statute and its apparent object for our guide in its interpretation. The statute provides that the notice shall be served in writing 'on the publisher or publishers of said newspaper,' and no provision is made for serving notice on any other person. The act seems to be for the purpose of preventing litigation in regard to those articles which may have found their way into the columns of the newspapers by inadvertence or without knowledge or careful scrutiny on the part of the publishers. We know that the modern daily paper, with its numerous reporters, gathering news from every quarter, and its busy employés, working until late into the night to place the latest news before the readers early in the morning, is peculiarly liable to being inadvertently led into trouble in these matters, and it seems a proper classification to regulate this class of libel suits as applied to the publishers of newspapers. But with the individual, who prepares his article and pays for its publication, no such reason exists. For these reasons we hold that this provision of the statute does not apply to the defendants in this suit. It is true that the Supreme Court of North Carolina applied a libel law somewhat similar to our statute to an individual who was sued for a libel published in a newspaper; but it is to be noted that the particular point was not raised in that case, and, besides, the wording of the statute was different, in that the North Carolina statute required that the notice should be served 'on the defendant or defendants,' and not on the publisher of the newspaper, as in our statute. Williams v. Smith, 134 N.C. 249, 46 S.E. 502." The same trend has been evidenced in other cases. Clementson v. Minnesota Tribune Co., 45 Minn. 303, 47 N.W. 781, stating that the purpose of the statute was to require service on the publisher of the newspaper; Thorson v. Albert Lea Publishing Co., 190 Minn. 200, 251 N.W. 177, 90 A.L.R. 1169, protection is for newspapers because of the difficulties of preventing mistakes; Lydiard v. Wingate, 131 Minn. 355, 155 N.W. 212.

That the intention of the Legislature must be ascertained from the words it uses is clearly stated by the author of the majority opinion in this case as author of the majority opinion in People v. Knowles, 35 Cal.2d 175, 182, 217 P.2d 1, 5. He there said: "The will of the Legislature must be determined from the statutes; intentions cannot be ascribed to it at odds with the intentions articulated in the statutes. * * The court turns first to the words themselves for the answer. * * * Primarily, however, the words, in arrangement that superimposes the purpose of the Legislature upon their dictionary meaning, stand in immobilized sentry, reminders that whether their arrangement was wisdom or folly, it was wittingly undertaken and not to be disregarded." Even if the statute is susceptible of either construction, that given it by the majority decision raises serious constitutional questions not considered in the Werner case and hence the established rule applies that: "It is a well-recognized canon of interpretation that, where a legislative enactment is susceptible of two constructions, one consistent and the other inconsistent with the provisions of the constitution, such enactment should be so construed as to make it harmonious with the constitution and comport with the legitimate powers of the legislature." 5 Cal. Jur. 615.

Being of the opinion that the complaint states a cause of action for special, general and exemplary damages, the judgment should be reversed with directions to the trial court to overrule the demurrer and allow the defendants to answer as to all the issues presented by the complaint.

SCHAUER, Justice (concurring and dissenting).

I concur generally in the views and conclusion reached by Mr. Justice Carter. The vice in section 48a which seems to me most lethal, as I endeavored to point out in my dissent in Werner v. Southern California Associated Newspapers (1950), 35 Cal.2d 121, 150 et seq., 216 P.2d 825, 13 A.L.R.2d 252[1] is its licensing of two arbitrarily selected groups to maliciously engage in deliberately false libels.

The courts of last resort, both state and national, have unremittingly given staunch support to the constitutional freedoms of speech and press as against prior restraints. I am one who has been zealous to that end; but I had thought that the injustices which sometimes must flow from lack of prior restraints would be deterred, mitigated or compensated by subsequent responsibility, general and punitive, for abuses of the right.[2] Then in the Werner case, I found the state Legislature giving, and a majority of this court upholding, prior absolution to the selected groups of newspapers and radio broadcasters as against subsequent responsibility for either general or punitive damages and regardless of whether the libel or slander were inadvertent or knowingly and maliciously false.

Now I find the majority of the court extending their construction and effective application of the legislative act (Civ.Code, § 48a) to immunize the author of a slander or libel, whether inadvertent or deliberate, as well as the newspaper or broadcasting agency which gives circulation to the calumny.

An author, my prevailing associates hold, may deliberately and maliciously compose the vilest calumny, and if he can procure its publication in a newspaper or by a broadcasting company, by paid advertisement or otherwise, he can come within the encouraging arms of section 48a and repose securely immune from either general or punitive damages.

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[1] Whether the majority holding in Werner will stand on review by the United States Supreme Court has not as yet been determined. (Appeal to United States Supreme Court filed Aug. 25, 1950 (19 U.S. Law Week 3074); probable jurisdiction noted Oct. 16, 1950, 71 S.Ct. 81; appeal dismissed on motion of counsel for appellant Jan. 2, 1951, 71 S.Ct. 290.)

[2] California Constitution, article I, section 9: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right * * *."

Civil Code, section 3294: "[W]here the defendant has been guilty of * * * malice * * * the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

Does the spawning of such a doctrine bring pride to the free press of America? Or, perhaps, does the insistence of the newspapers and broadcasters on having something very akin to foolproof statutory immunity from liability in all libel-slander cases, just and unjust, rather than leaving to the courts their protection as against unfounded claims, stem in some measure from the very fact that a court of last resort which will sustain such a doctrine may be found?

102 Cal.App.2d 586

DE LA TORRE v. VALENZUELA et al.

Civ. 17778

District Court of Appeal, Second District, Division 3, California.
March 2, 1951.

Action by Joe G. De La Torre against Adolph B. Valenzuela, doing business as Rudy's Dump Truck Company, a fictitious name, and Albert Alonge, to recover damages for personal injuries sustained when plaintiff's leg was run over by a dump truck. The Superior Court of Los Angeles County, Edward R. Brand, J., entered a judgment of nonsuit in favor of both defendants and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that the evidence presented questions of fact for jury as to whether driver of truck was negligent, and whether his negligence was the proximate cause of plaintiff's injuries, and whether plaintiff was guilty of contributory negligence.

Judgment reversed.

1. Trial 🔑139(1), 142

It is duty of trial court to deny motions for a nonsuit at close of plaintiff's case if there is any substantial evidence which, with the aid of all legitimate inferences favorable to plaintiff, would have justified findings in his favor on the issues of negligence, contributory negligence and proximate cause.

2. Negligence 🔑62(1), 136(25)

The issue of proximate cause is essentially one of fact and an intervening agency does not break the chain of causation where injury has occurred which was reasonably foreseeable and should have been anticipated.

3. Master and servant 🔑332(1)

Where workman at a construction job was working on a ramp in the same way, place and in the same manner as he was accustomed to and he was not aware that flagman was not at his usual station so as to warn of approaching trucks on ramp, questions were presented for jury as to whether truck driver was negligent in running over workman and whether such negligence was the proximate cause of workman's injuries, and whether workman was guilty of contributory negligence.

4. Negligence 🔑136(9)

Contributory negligence is not shown as a matter of law if there is a reasonable basis in the evidence and reasonable inferences to support a contrary conclusion and generally question is one for jury.

5. Master and servant 🔑330(3)

In action by a construction worker against the owner of a dump truck and driver thereof who drove over workman while on a construction job, evidence was sufficient to support a finding that an employer and employee relationship existed between the driver of the truck and the owner.

◆

Francis J. Gabel, Clifford E. Lewis, Los Angeles, Henry F. Walker, Los Angeles, of counsel, for appellant.

Bauder, Gilbert, Thompson, Kelly & Veatch and Roger Kelly, Los Angeles, for respondent, Adolph B. Valenzuela.

Chase, Rotchford, Downen & Drukker, Donn B. Downen, Jr. and Richard T. Drukker, Los Angeles, for respondent, Albert Alonge.

SHINN, Presiding Justice.

Appeal by plaintiff from a judgment of nonsuit in an action to recover damages for personal injuries entered in favor of both defendants, Adolph B. Valenzuela and Albert Alonge.

The accident occurred in 1947 during the construction of a building for Southern California Edison Company at Redondo Beach, when plaintiff's leg was run over by a dump truck. In order to explain how plaintiff's injuries occurred, it is necessary to describe the locale of the accident. A wall of the building was being constructed of concrete. Forms, made of sheets of plywood, 4 X 8, of 9/16ths thickness were used. These forms were held in place by 2 X 4's with steel bolts. After use, the materials of each form would be removed and lowered with ropes from the top of the completed portion of the wall to workmen on the ground. These workmen cleaned the plywood sheets of any remaining cement, removed the nails, and stacked the sheets in piles to be used again to make new forms. Each plywood sheet weighed 40 or more pounds, depending on the amount of cement remaining thereon. At the time of the accident, the wall had been built to a height of from 85 to 90 feet, and the sheets, while being lowered, would strike windows or other projections on the side of the wall so that at times they would bounce outward from 12 to 15 feet. There was evidence that these pieces would be scattered all around the excavation. On the west side of the wall being constructed was an excavation approximately 15 feet deep which ran the entire length of the wall, a distance of 265 feet. The wall ran north and south, and the width of the excavation was from the west side of the wall almost to the sidewalk line of Hermosa Avenue which runs in a northerly and southerly direction. The bottom of the excavation was of soft sand and another or second excavation was being dug therein, beginning at the south end of the first excavation and extending in a northerly direction some 150 feet. Boards, to form a driveway or ramp, had been laid on the bottom of the excavation, about 20 feet west of the wall, from 11th Street on the north to the second excavation which was to be used for inlet or outlet pipes. At the 11th Street, or north end of the ramp it curved for about 12 to 14 feet as it rose to street level but otherwise the driveway was a straight course in the excavation and the view was unobstructed from one end of the ramp to the other. The ramp, or plank driveway, was used by men operating dump trucks as they backed down from 11th Street to the bottom of the excavation where the trucks would be filled with the excavated soil by a power shovel.

Plaintiff, Joe G. De La Torre, was one of the workman employed by the contractor to gather up the plyboard sheets, clean them, remove the nails, and stack them in a pile. Defendant Albert Alonge was the driver of the 13,000 pound dump truck which ran over plaintiff's leg causing his injuries. Defendant Adolph B. Valenzuela (sued as H. B. Valenzuela), doing business as Rudy's Dump Truck Company, was alleged to be the employer of defendant Alonge. At the time of the accident, plaintiff was engaged, with other members of the crew, in cleaning and de-nailing the plywood sheets. The crew had been instructed by the foreman to stack the material at the far south end of the ramp about a foot therefrom. Plaintiff picked up a plywood sheet and took it over to the stack, at which time he looked up the ramp toward the north end for a truck but saw none. He then occupied himself with pulling out nails from the plywood, leaning over as he did so. There was evidence that there was a great deal of noise from the crane, water pumps and carpenters working in the excavation and that plaintiff neither saw nor heard the truck before it struck him. After the accident, plaintiff was lying about 15 to 20 feet from the south end and from 3 to 5 feet to the side of the ramp. Prior to the accident, plaintiff had, apparently, been working on the easterly, or wall side, of the ramp, or to the right rear of the truck. The record shows that defendant Alonge had used the runway about 25 times prior to the accident and that at all times a spotter or flagman had been present to direct the trucks and see that no workmen were on the ramp. On the day of the accident the flagman was absent from his usual station. It was shown that the workmen frequently worked on the ramp. Defendant driver, called under section 2055, Code of Civil Procedure, testified that he looked to make sure no truck was down there but did not notice plaintiff or the other workmen, and after negotiating the curve did not notice that the flagman was not present. He then proceeded to back down the curve during which time he remained seated in the cab of the truck looking between the seat and the back of the dump truck so as to follow the marks made by other trucks in making the curve. When he reached the straight part of the ramp, he stood partially on the running board and watched the left rear wheels while backing. He did not look in either the right or left rear view mirrors with which the truck was equipped and at no time did he look behind the truck as it moved; he did not sound a horn at any time during his progress down the ramp. It was estimated that his speed in backing down the runway was from five to eight miles an hour. The record shows that some men called to him to stop; that he then lowered himself back into his seat and just before applying his brakes felt "some bumps," but did not stop the truck until he felt the wheels go over something.

Defendant Alonge moved for a nonsuit on the ground that there was no evidence of any negligence on his part; that, assuming negligence, it was not a proximate cause of the accident; and that the evidence showed plaintiff to have been guilty of contributory negligence. Defendant Valenzuela moved for a nonsuit on the grounds that there was no evidence of employer-employee relationship between him and defendant Alonge; and that the evidence showed plaintiff to have been guilty of contributory negligence. The trial court held that defendant Valenzuela's motion based on lack of evidence of employment should be denied, but granted the motions for nonsuit as to both defendants on the question of "negligence" and discharged the jury. Plaintiff contends that the nonsuits were improperly granted. We are obliged to agree.

[1] It was the duty of the trial court to deny the motions for a nonsuit at the close of plaintiff's case if there was any substantial evidence which, with the aid of all legitimate inferences favorable to the plaintiff, would have justified findings in his favor on the issues of negligence, contributory negligence and proximate cause. Raber v. Tumin, 36 Cal.2d 654, 226 P.2d 574. Reasonable inferences were that Alonge must have been aware of the presence of workmen in the excavation; that they often used the ramp when pulling nails from the plywood sheets; also that he was aware that on every occasion, prior to the one under consideration, he had seen a flagman or spotter present who had warned him of other trucks and had warned the workmen of the approach of his truck. The jury could have inferred that in the exercise of ordinary care Alonge would have observed that the flagman was not on duty and could have found that under such circumstances it was his duty to warn the workmen of his approach. Defendants say that he had no duty to sound his horn unless there was apparent danger, citing Edelson v. Higgins, 43 Cal.App.2d 759, 111 P.2d 668. But here the jury could have found there was apparent danger of injury to workmen and that the situation called for a warning of the approach of the truck. It may not be held as a matter of law that Alonge owed no duty to warn the workmen.

[2, 3] Defendant Alonge maintains that the absence of the flagman was such an intervening cause as to break the chain of causation between his negligence, if any, and plaintiff's injuries. The issue of proximate cause is essentially one of fact and an intervening agency does not break the chain of causation where injury such as the one that occurred was reasonably foreseeable and should have been anticipated. The movement of the truck was an active continuous force and if Alonge had been found to have been negligent, it would not have been unreasonable to find also that his negligence was a proximate cause, if not the sole cause of the accident. Under such a finding his liability would have been established even though there were other contributing causes. Gibson v. Garcia, 96 Cal.App.2d 681, 216 P.2d 119; Werkmen v. Howard Zink Corp., 97 Cal.App.2d 418, 425, 218 P.2d 43.

[4] The trial court was not justified in granting a nonsuit on the ground that plain-

tiff was guilty of contributory negligence as a matter of law. This alleged contributroy negligence is said to have consisted of plaintiff's presence on the ramp, rather than on top of the pile of lumber or in the two foot space between the pile and the wall, knowing that the ramp was used by the dump trucks, his failure to continue to look for trucks, and, apparently, his failure to hear the approach of defendant's truck. The rule respecting proof of contributory negligence as a matter of law has been stated in various ways in a legion of cases. The substance of all of them is that contributory negligence is not shown as a matter of law if there is a reasonable basis in the evidence and reasonable inferences to support a contrary conclusion. Plaintiff was engrossed with his work in the same way, place, and the same manner as he was accustomed to work. It was not shown that he was aware that the flagman was not at his usual station. He testified that he looked once for trucks and did not look again. Mere forgetfulness of an expected or known danger will not operate to prevent a recovery, for to forget is not negligent unless it amounts to want of ordinary care. And generally the question is one for the jury Kirk v. Los Angeles Ry. Corp., 26 Cal.2d 833, 161 P.2d 673, 164 A.L.R. 1; Neel v. Mannings, Inc., 19 Cal.2d 647, 122 P.2d 576; Gibson v. County of Mendocino, 16 Cal.2d 80, 105 P.2d 105. Defendants insist that the facts of the present case are almost identical with those in Warnke v. Griffith Co., 133 Cal.App. 481, 24 P.2d 583, 586 and that the decision in that case is controlling on the proposition that De La Torre was guilty of contributory negligence as a matter of law. Aside from material differences in the facts of the two cases the question of contributory negligence as one of law was not involved or discussed in the Warnke case. The court had instructed that the workman who was run over by a truck was "not called upon to exercise the same amount of diligence in avoiding accidents as pedestrians or others who use the same place merely as a medium of locomotion." The discussion in the opinion of Warnke's conduct upon which defendants here rely merely had relation to the contention that the court should also have instructed that the workman was not bound to neglect his work in order to avoid an injury which might be caused by want of ordinary care on the part of operators of vehicles. The point decided was that the only instructions warranted by the facts were those given by the court. The question of contributory negligence was treated as one of fact. There was not the least suggestion that Warnke was guilty of contributory negligence as a matter of law. The observations of the court with respect to his conduct furnish no guide to the decision of a motion for nonsuit upon the ground that contributory negligence has been shown as a matter of law. The question whether De La Torre in the exercise of ordinary care could work without keeping a constant watch for trucks, in reliance on the duty of care owed by the drivers of the trucks should have been submitted to the jury. We are unable to say that plaintiff was guilty, as a matter of law, of contributory negligence in proceeding with his work without watching more carefully for trucks on the runway.

[5] The evidence and inference with respect to whether defendant Alonge was an employee of defendant Valenzuela, acting within the scope of his employment were conflicting, and the trial court properly denied the motion for nonsuit based on that ground. We deem it unnecessary to discuss the evidence upon that issue further than to say there was evidence sufficient to support a finding that an employer-employee relationship existed with respect to the work in which Alonge was engaged.

The judgment is reversed. The appeal from the order granting motion for nonsuit is dismissed.

PARKER WOOD and VALLÉE, JJ., concur.

102 Cal.App.2d 602

PERRY v. MEIKLE et al.

Civ. No. 14637.

District Court of Appeal, First District,
Division 2, California.
March 5, 1951.

Action by Bernice Perry against Theresa Meikle, and others, for alleged conspiracy in committing trespass against plaintiff by falsely imprisoning her. The Superior Court in and for the City and County of San Francisco, Frank T. Deasy, J., rendered judgment for the defendants, and plaintiff appealed. The District Court of Appeal, Schottky, J., pro tem., held that as the only action purporting to constitute a tort, as alleged in complaint, was based on action and order of a judge acting within scope of his judicial function, a lawful act, in adjudging plaintiff guilty of contempt for failing to comply with court order relating to custody of minor child, which order modified interlocutory decree, complaint did not state, nor could it, by amendment, be made to state a cause against any of the defendants.

Judgments affirmed.

1. Evidence 🔑43(3), 44

In action by plaintiff for alleged conspiracy by defendants to commit trespass against plaintiff by falsely imprisoning her, District Court of Appeal could take judicial notice of fact that two of the defendants were and are judges of the Superior Court, that one of defendants is a probation officer, and of fact that writ of habeas corpus issued by District Court of Appeal, upon which plaintiff was released, was later discharged.

2. Judges 🔑36

Where alleged conspiracy by defendants as result of which trespass was committed against plaintiff by allegedly falsely imprisoning her arose out of order of a defendant, as a judge of the Superior Court, declaring plaintiff to be in contempt of court for her failure to deliver minor child to husband in compliance with court order modifying interlocutory decree, and it was clear from complaint and exhibits that defendant judge was acting as a superior judge in a matter over which he had jurisdiction, and proceeding was regular in all respects, there was no basis for any action against judge, even if he were not entitled to immunity from civil liability.

3. Judges 🔑36
Justices of the peace 🔑24

All judicial officers, justices of the peace, as well as judges of the higher courts, when they act within their jurisdiction, are not amendable to any civil action for damages, and no matter what their motives may be, they cannot be inquired into.

4. Judges 🔑36

Judges of court of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously and corruptly.

5. Judges 🔑36

An action will not lie against a judge for wrongful commitment, or for an erroneous judgment, or for any other act, made or done by him in his judicial capacity.

6. Divorce 🔑305
False Imprisonment 🔑7(2)

Where in divorce action there was a modification of interlocutory decree by which custody of minor child was given to father, and he and his attorney had sought and obtained an order to show cause requiring plaintiff to deliver up minor child to him, and defendant judge ordered plaintiff to produce child in court, which she failed to do, and judge thereupon adjudged plaintiff in contempt of court and signed a commitment for her confinement until she complied with order of court, judge acted within his jurisdiction and commitment was valid and there was no basis for an action for false imprisonment.

7. Conspiracy 🔑1

A conspiracy is not actionable unless alleged combination results in perpetration of an unlawful act or some injurious act by unlawful means.

8. Conspiracy 🔑6

A conspiracy cannot be made the subject of a civil action unless something is done which without conspiracy would give rise to a right of action.

9. Conspiracy ⚿18

Where alleged conspiracy by defendants, as result of which trespass was allegedly committed against plaintiff by allegedly falsely imprisoning her, arose out of order of a defendant, as a judge of Superior Court, declaring plaintiff to be in contempt of court for her failure to deliver minor child to child's father in compliance with court order modifying interlocutory decree, and action of defendant judge, in adjudging plaintiff guilty of contempt and committing her to jail was within his jurisdiction, plaintiff's complaint did not state, nor could it by amendment be made to state, a cause of action against defendant judge, child's father or his attorneys or probation officer, whether by conspiracy or by otherwise.

◆

John P. Doran San Francisco, for appellant.

Aaron Sapiro, Allan L. Sapiro, San Francisco, for respondents, Theresa Meikle, Milton D. Sapiro, Twain Michelsen and Mary K. Maloney.

Frank J. Perry, John F. O'Sullivan, San Francisco, for respondent, Frank J. Perry.

A. P. O'Neill, San Francisco, for respondents, Joseph E. Perry and A. P. O'Neill.

SCHOTTKY, Justice Pro Tem.

Plaintiff commenced an action naming as defendants Theresa Meikle, Milton D. Sapiro, Twain Michelsen, Joseph E. Perry, Frank J. Perry, A. P. O'Neil and Mary K. Maloney.

The complaint first alleges that the defendants (not naming any of them except in the title) conspired, etc., and through their conspiracy, etc., together, did commit trespass against plaintiff by falsely imprisoning her and causing her to be imprisoned in the county jail of the City and County of San Francisco for a period of six hours on April 29, 1949. The complaint proceeds to allege that the common purpose of said conspirators was to humiliate, oppress and degrade plaintiff and the means used was the manipulation and abuse of the processes of the courts. The complaint then alleges that said false imprisonment consisted in and was constituted of certain facts, and we shall give the substance of such allegations. That plaintiff appeared before defendant Twain Michelsen on April 22, 1949, in compliance with an order to show cause, a copy of which is annexed to the complaint, which order to show cause was based upon the affidavit of defendant Joseph E. Perry, a copy of said affidavit being annexed to the complaint. That plaintiff appeared before defendant Twain Michelsen on April 22 in response to said order to show and an answer which she had filed on April 19th was read into the record by defendant Twain Michelsen, a copy of said answer being annexed to the complaint. That on April 25, 1949, defendant A. P. O'Neil, accompanied by defendant Joseph E. Perry appeared before defendant Twain Michelsen pursuant to an order theretofore issued by him and plaintiff was present. That at that time and place defendant Twain Michelsen ordered plaintiff to bring her minor child Yvonne into his courtroom on April 29, 1949. That said plaintiff appeared in said courtroom on April 29th and defendant Joseph E. Perry and his counsel, defendant A. P. O'Neil, were also present. That defendant Twain Michelsen asked plaintiff if she had complied with the court's order, and, upon being informed by her that she had not, he adjudged her in contempt of court, remanded her to the custody of the sheriff and told her she would remain in custody until she complied with the court's order. That then defendant A. P. O'Neil typed an order of commitment which was signed by the defendant Twain Michelsen, and that plaintiff was then taken in the sheriff's wagon to the county jail in the Hall of Justice and remained incarcerated there until released on a writ issued by the District Court of Appeal.

[1] The only defendants whose names are mentioned in the body of the complaint are Twain Michelsen, Joseph E. Perry and A. P. O'Neil. There is nothing whatever in the complaint to indicate how or in what manner any of the other defendants par-

ticipated in or instigated the legal proceedings referred to in the complaint. It appears from the record that there was a divorce action between Joseph E. Perry and plaintiff and that plaintiff was found to be in contempt of court for not delivering up the minor child to Joseph E. Perry as provided in the order modifying the Interlocutory Decree. It is not even alleged that Twain Michelsen was a judge of the superior court although this is apparent from the proceedings. It is conceded in appellant's brief, but not alleged in plaintiff's complaint, that defendants Theresa Meikle and Milton D. Sapiro were and are judges of the superior court, but even without this concession we may take judicial notice of that fact. It is also conceded in appellant's brief that defendant Mary K. Maloney is a probation officer, and the trial judge was of course entitled to take judicial notice of that fact. We are also entitled to take judicial notice of the fact that the writ of habeas corpus issued by the District Court of Appeal, upon which plaintiff was released, was later discharged, the court stating: "It appearing to the court that the trial court had jurisdiction of the person and the subject matter, and that a valid commitment had been issued, it is the order of the court that the writ of habeas corpus be discharged and the prisoner is remanded to custody." Ex parte Perry, 91 Cal.App.2d 677, 206 P.2d 652, 653.

Five demurrers to the complaint were filed: 1. A general demurrer by defendant Michelsen; 2. A general demurrer by defendants Meikle, Sapiro and Maloney; 3. A general and special demurrer by defendant Joseph E. Perry; 4. A general demurrer by defendant A. P. O'Neil; 5. A general and special demurrer by defendant Frank J. Perry. The court sustained the first 3 demurrers without leave to amend and sustained the last two with leave to amend, the plaintiff declining to amend. From the judgments entered in favor of defendants after the sustaining of said demurrers, the plaintiff has appealed.

[2, 3] Notwithstanding the apparent effort of plaintiff to keep from alleging that defendant Twain Michelsen was a judge of the superior court and was acting as such in the proceeding complained of, it is clear from the complaint and the exhibits that Judge Michelsen was acting as superior judge in a matter over which he had jurisdiction, that the proceeding was regular in all respects, and that there would be no basis for any action against him, even if he were not entitled to immunity from civil liability under the well-established and sound rule of public policy so well expressed by Justice Brewer of the U. S. Supreme Court, sitting as a Circuit Justice, in Cooke v. Bangs, C.C., 31 F. 640, 642, as follows: "With respect to all judicial officers,—justices of the peace, as well as judges of the higher courts,—the settled law of the supreme court of the United States, and I think the plain intimation of the supreme court of this state, is that, where they act within their jurisdiction, they are not amendable to any civil action for damages. No matter what their motives may be, they cannot be inquired into."

[4] And in Turpen v. Booth, 56 Cal. 65, 69, our Supreme Court quoted with approval the following language of Justice Field in Bradley v. Fisher, 13 Wall. 335; 20 L. Ed. 646: "[J]udges of courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, *even when such acts are in excess of their jurisdiction,* and are alleged to have been done maliciously and corruptly * * *."

[5] In Platz v. Marion, 35 Cal.App. 241, at page 248, 169 P. 697, at page 700, the court said: "The doctrine that an action will not lie against a judge for wrongful commitment, or for an erroneous judgment, or for any other act, made or done by him in his judicial capacity, is as thoroughly established as are any other of the primary maxims of the law. Such an exemption is absolutely essential to the very existence, in any valuable form, of the judicial office itself; for a judge could not be either respected or independent if his motives for his official actions or his conclusions, no matter how erroneous, could be put in question at the instance of every malignant or disappointed suitor. Hence we find this judicial immunity has been conferred by the laws of every civilized people." See also

Prentice v. Bertken, 50 Cal.App.2d 344, 123 P.2d 96; Malone v. Carey, 17 Cal.App.2d 505, 62 P.2d 166; Baer v. Smith, 68 Cal. App.2d 716, 721, 157 P.2d 646.

We are convinced that in view of the above stated doctrine of judicial immunity and the facts as shown by the complaint and exhibits thereto, no cause of action was stated or could be stated against defendant Twain Michelsen and that his demurrer to the complaint was properly sustained without leave to amend.

[6] The complaint is entitled "Conspiracy—False Imprisonment" and plaintiff in his complaint charged all of the defendants with conspiracy falsely to imprison her and that they did cause her to be imprisoned. We have hereinbefore summarized the allegations of the complaint and have shown the nature of the proceedings before Judge Michelsen. It is clear from the record that in the divorce action there had been a modification of the Interlocutory Decree which gave the custody of the minor child, Yvonne, to her father, defendant Joseph E. Perry, and that he and his attorney, defendant A. P. O'Neil, had sought and had issued an order to show cause requiring plaintiff to deliver up said minor child to him; that Judge Michelsen had ordered plaintiff to produce the child in court, that he had failed to do so, and he had thereupon adjudged her in contempt of court and signed a commitment for her confinement in jail until she had complied with the order of the court. It is clear also that Judge Michelsen acted within his jurisdiction and that the commitment was valid. Consequently there could be no sound basis for an action for false imprisonment.

[7, 8] A conspiracy is not actionable unless the alleged combination results in the perpetration of an unlawful act or some injurious act by unlawful means. Nowhere in the complaint or the exhibits attached thereto is there any allegation of either an unlawful act or an injurious act by unlawful means, committed by any of the defendants. A conspiracy cannot be made the subject of a civil action unless something is done which without the conspiracy would give rise to a right of action.

As was said in Wallace v. Kerr, 42 Cal. App.2d 182 at pages 184–185, 108 P.2d 754, at page 756: "It is well settled that a conspiracy cannot be made the subject of a civil action unless something is done which without the conspiracy would give a right of action. The damage is the gist of the action, not the conspiracy. Bowman v. Wohlke, 166 Cal. 121, 135 P. 37; More v. Finger, 128 Cal. 313, 60 P. 933. It is the wrong done and the damage suffered pursuant to the conspiracy which is the cause of action, rather than the conspiracy itself." See also Richmond Terminal Corp. v. Parr Terminal Corp. Co., 116 Cal.App. 368, 2 P.2d 579; Bentley v. Mountain, 51 Cal.App.2d 95, 124 P.2d 91.

[9] Here the only action purporting to constitute a tort, as alleged in the complaint, is based upon the action and order of a judge acting within the scope of his judicial function, a lawful act. And it is clear that the action of Judge Michelsen adjudging plaintiff guilty of contempt and committing her to jail was one that was entirely within his jurisdiction, and there is nothing in the complaint or in the exhibits thereto that would indicate that his action was not a proper exercise of his judicial function. Indeed it is difficult to understand how any of the defendants could be subject to liability for bringing a matter before a court, whether by conspiracy or otherwise, when, as in the instant case, the proceedings were regular, and the court had jurisdiction to proceed, and when the injury complained of is the result of an order which the court not only had a right to make but which appears to be a proper order in every respect.

The demurrers of defendants Theresa Meikle, Milton D. Sapiro, and Mary K. Maloney and the demurrer of defendant Joseph E. Perry were sustained without leave to amend. The demurrers of defendants A. P. O'Neil and Frank J. Perry were sustained with leave to amend but plaintiff declined to amend. We believe that in view of the foregoing, the complaint does not state, nor could it by amendment be made to state, a cause against any of defendants, and that therefore all of the demurrers were properly sustained.

The judgments are affirmed.

GOODELL, Acting Presiding Justice, DOOLING, J., concur.

102 Cal.App.2d 700

EDGAR et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 4060.

District Court of Appeal, Fourth District, California.

March 7, 1951.

Rehearing Denied March 28, 1951.

Action by Laura B. Edgar, and others against the Bank of America National Trust and Savings Association, Charles Findlay, and others to recover damages for the use, occupancy, rents, issues and profits of trust property sold without obtaining consent of the beneficiaries. From a judgment of the Superior Court, Kern County, Clark Clement, J., in favor of the plaintiffs, the plaintiffs and Charles Findlay and others appealed. The District Court of Appeal, Fourth Appellate District, Mussell, J., held that the decision of the trial court fixing recovery to which beneficiaries were entitled for breach of trust could not be disturbed where it was supported by substantial evidence.

Judgment affirmed.

1. Appeal and error 🔑1010(1)

Where trustee sold arid trust land by mistake and water from wells drilled thereon was used to irrigate adjoining land, trial court's determination, in fixing amount of beneficiaries' recovery against trustee of the fruits of the trust property, allowing 20% of net return from adjoining land to the water and 80% to use and productivity of land would not be disturbed where supported by substantial evidence.

2. Appeal and error 🔑996, 1011(1)

Reviewing court will not determine conflicts in the evidence nor choose between different inferences which may be drawn from testimony.

3. Appeal and error 🔑931(1), 1010(1)

Trial court's findings must be sustained if supported by substantial evidence, all legitimate and reasonable inferences must be indulged toward upholding the findings and doubts should be resolved in favor of the finding.

John W. Preston, Los Angeles, and Henry C. Mack, Bakersfield, for appellants.

S. B. Stewart, Jr., G. D. Schilling, San Francisco, U. A. Gribble, Salinas, Johnston, Baker & Palmer, Bakersfield, and Erskine, Pillsbury & Tulley, San Francisco, for respondent.

MUSSELL, Justice.

In 1921 the plaintiffs purchased eighty acres of land situated in Kings County, California, for the sum of $8,000. Because there were some thirty or more purchasers, the title was conveyed to Security Trust Company to hold under a trust agreement. The agreement provided that the trustee could not sell or lease without the consent of 51% of the beneficial interests. Defendant Bank of America thereafter succeeded to all of the rights, duties and liabilities of the Security Trust Company as trustee. From February, 1921, until December, 1936, the property was rented by plaintiffs, whenever it could be, for grazing purposes and the rentals received by them did not exceed the amount of the taxes. The taxes for the years 1932 to 1935, inclusive, were allowed by plaintiffs to become delinquent. These taxes were paid by the Bank on January 5, 1937, and during the years 1933, 1934 and 1935 no rental money was received by the beneficiaries from grazing.

In the fall of 1936, D. C. Scott and E. G. Stahl, believing that they could develop water on this 80 acres, sought to buy the property and also leased about 900 acres of adjoining and surrounding land at a rental of from 50¢ to $1 per acre. In December, 1936, the defendant Bank, in violation of its trust, but in the belief that it owned the 80 acres, sold the same to Scott and Stahl for $800, payable in installments, reserving the oil rights. Early in 1937, Scott and Stahl drilled two water wells on the trust land, complete with casing, at a cost of approximately $4,305. These wells produced about 1200 gallons of water per minute each, which proved sufficient to irrigate about 1,000 acres of land. When water was developed on the 80 acres on March 1, 1937, Scott and Stahl leased the trust land and subleased the adjoining 900 acres to Sample Bros. for a period of five years and five months, expiring on August 1, 1942, with the right to use water produced on the 80 acres, both on that land and on the adjoining 900 acres. The Samples agreed to and did pay Scott and Stahl a rental of $5 per acre per year for both the 80 acres and the 900 acres. They agreed to pay the cost of drilling the wells, with the casing, these amounts to be deducted from the rentals due. They also agreed to operate the pumps and deliver the water to various portions of the land at their own expense. The Samples used the water so produced until August 1, 1942, and raised valuable crops on the property. After the leases had expired in 1942, Scott and Stahl acquired two 10 acre tracts adjoining the trust land on the north and on the south and drilled thereon two wells from which the 900 acres were then irrigated.

In October, 1937, one of the beneficiaries discovered that extensive farming operations were being conducted on the 80 acres. This was reported to the Bank and an investigation was made. Immediately upon discovery of the Bank's error in selling the trust property, the oil, gas and mineral rights were restored to the trust. Negotiations were then conducted by the Bank, which, on March 10, 1938, resulted in a repurchase of the 80 acres by the Bank, subject to a reservation in the deed from Scott and Stahl, reserving unto them the use and occupation of the 80 acres until August 1, 1942, on the payment by them of $200 cash and $400 annually, beginning with the 1st day of August, 1938 to and including August 1, 1941. The water wells and casings were to be maintained in good condition, reasonable wear and tear excepted, and delivered to the Bank at the end of the term. The repurchase price paid by the bank for the property, subject to the reserved use, was the cancellation of the balance of $500 owing on account of the original purchase price from Scott and Stahl and the further sum of $5,000 cash. This valuation of $5,500 was predicated on the amount that Scott and Stahl had paid for the property and the cost of drilling and equipping the wells with casings.

The instant action was originally brought by the beneficiaries of the trust against the trustee for damages for the use, occupancy, rents, issues and profits of the trust property which the trustee had sold without obtaining the written consent of the beneficiaries as provided in the trust agreement. On a former appeal (Edgar v. Bank of America, 50 Cal.App.2d 827, 123 P.2d 885) a judgment against the bank for $25,000 was reversed on the ground that it was based upon several measures of recovery without any election to rely upon any one of them in particular. It was there pointed out that under section 2237 of the Civil Code, where trust property has been wrongfully disposed of by the trustee, the beneficiaries of the trust may, at their option, either compel the trustee to replace the property "with its fruits" or compel the trustee to account for its profits with interest. Thereafter, the plaintiffs, having elected to seek the restoration of the property with its fruits, filed an amended complaint in which they asked to have the 80 acres fully restored to the trust and to have the bank account to the trust for the value of the water and other fruits and products produced between December 28, 1936 and August 1, 1942. On the second trial of the case, the trial court, sitting without a jury, held that the trustee had restored the trust property to the trust and that the fruits thereof were the rents paid by Scott and Stahl to the trustee bank in the total amount of $1,800 and rendered judgment accordingly. Plaintiffs appealed and that judgment was reversed by this court. Edgar v. Bank of America, 73 Cal. App.2d 871, 167 P.2d 509.

Upon the second appeal, this court held that the water taken from the trust land and used to irrigate the 900 acres of adjoining lands was part of the actual fruits of the trust property and that the trustee must account for the "net value" of what Scott and Stahl received therefor. In commenting upon the situation, this court said in Edgar v. Bank of America, 73 Cal. App.2d 871, 874, 167 P.2d 509, 511:

"The land being returned and it being thus admitted that the appellants should be charged for the enhanced value of the land, the essential question here is as to what may be said to constitute the fruits of this land during the period from the date of the wrongful conveyance up to August 1, 1942, when possession was finally restored to the trustee. The main controversy is over the question as to whether the water removed from the 80 acres and used on the 900 acres should be considered and accounted for as a part of the fruits of the 80 acres.

* * * * * *

"Restoration of the land, with its 'fruits', requires, in addition to restoring the title, an accounting, on some basis, for what the land produced over the period in which the appellants were deprived of its possession. As was said in Work v. County Nat. Bank & Tr. Co., 4 Cal.2d 532, 51 P.2d 90, 93, 'The alternative remedies * * * are all aimed to make the beneficiary whole * * *. The only way the trust properties can be "replaced" is to permit the respondents to receive what they would have received had appellant been faithful to its trust.' Obviously, what was received by the Samples from the use of the 80 acres is not the true test, as that would include the results of their work and skill in farming the land. Nor does the $1,800 paid to the bank represent the real fruits of the land for this period. That is merely an amount which the bank was compelled to accept because of the situation resulting from its own error. Moreover, that is not all the bank received. It received an additional value through regaining the title on favorable terms, by further deferring possession and use of the land.

"Under the circumstances here, the true test as to what were the fruits of this land during this period is what it produced for those to whom it had been wrongfully conveyed, and who stood in the position that the appellants should have occupied. The 'fruits', with which we are here concerned, is the net amount produced from the 80 acres and received by Scott and Stahl who actually exercised the rights of ownership during that period. What they were able to do with the land and what they received for the use thereof constitutes the actual production and fruits of the land. This cannot fairly be measured by the $5 per acre rental paid to them for that land, along with the other 900 acres. The 80 acres, with its supply of water, produced much more than a proportionate share of the total return. The water taken for use on the other land was an important part of that return and of the fruits of the 80 acres.

"The net value or return to Scott and Stahl from the water thus removed from the 80 acres should have been determined and included as one of the fruits of the property. This net return from a specific operation which was carried out is such part of the $5 per acre per annum which Scott and Stahl actually received as rental for the 900 acres, less their expenses, as should properly be credited to the water taken from the 80 acres while allowing a proper proportion to the use and productivity of the 900 acres, since both elements contributed to the net profits realized by them on the entire deal. This figure, when determined, should have been added to the net amount received by Scott and Stahl as rental for the surface of the 80 acres. (Apparently this rental was $2,000 and not $1,800.) From this total should have been deducted the amount by which the value of the 80 acres was enhanced through the improvements made. The remainder, with a proper allowance for interest, would constitute the fruits of this land to which the appellants were entitled."

Under this state of the record, the cause was remanded for a third trial, at which the trial court determined that the fruits of the trust land could best be ascertained by applying the crop share rental rule as between landlord and tenant, to wit: that where land is leased without water, the landlord receives one-fifth of the crop and with water available, receives one-fourth of the crop. The court, in elaborate findings, found, among other things, that the "fruits" for which the said Bank should account were the rents of said land (the 80 acres) paid by Sample Bros. to said grantees from December 28, 1936, to August 1, 1942, plus the net return to said grantees during said period from the water removed from the said lands (the 80 acres) and used to irrigate said adjoining 900 acres. "Said net return of said grantees from said water was their net return from said adjoining 900 acres, less the proportion of said net return from said adjoining 900 acres which should be allocated to the use and productivity thereof. The proportion of said net return from said adjoining 900 acres which should be allocated to the use and productivity thereof is 80% of said net return, and the proportion of said net return which should be allocated to said water from said land (the 80 acres) used to irrigate said 900 adjoining acres is 20% of said net return." The court then set forth figures showing the total fruits of the said land for the five-year period involved as being the sum of $7,362.54. He then deducted from this total the sum of $1,614.35 for permanent improvements to the land and interest on this amount in the sum of $776.59 and entered judgment that the plaintiffs recover from the said bank a net amount of $4,971.60.

The question now before us is whether this judgment is supported by substantial evidence.

[1] It is apparent that there is no fixed rule set forth in the previous opinions on appeal herein by which the proportion of "fruits" of the water taken from the 80 acres and used on the adjoining land can be ascertained. The determination of that question was for the trial court upon the evidence presented. The court apportioned the net received by Scott and Stahl from the 900 acres to the land and water upon the analogy of a crop lease, stating that such an analogy was the "soundest method of determining the proportion of the agricultural production allocable to the land and the proportion allocable to the water." The application of this theory resulted in a judgment allowing 20% of the net return to the water and 80% to the use and productivity of the adjoining land. The allocation thus made, whether under the theory of a crop lease or not, if reasonable under all of the circumstances shown, and supported by substantial evidence, cannot be here disturbed. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Dillard v. McKnight, 34 Cal.2d 209, 223, 209 P.2d 387, 11 A.L.R.2d 835.

There was a conflict in the evidence as to the correct division of the "fruits" of the water and of the adjoining land. Mr. Holley, a qualified civil and hydraulic engineer, on behalf of the defendant, testified that he had made a considerable survey of the premises involved; that, assuming that the net return of Scott and Stahl for a five-year, five-month period, ending on August 1, 1942, from the 900 acres, was as testified to by Mr. Stahl, from $2.50 to $3 per acre per year, the proportion that should be allocated to the water taken from the 80 acres and the proportion allocable to the use and productivity of the 900 acres should be about one part to the water and four parts to the land; that his opinion was based on his knowledge and observation; that the two wells on the 80 acres might just as well have been placed on the 900 acres; that in his opinion wells sunk on the 900 acres would have produced water at the same reasonable cost as the wells on the 80 acres; and that the reasonable cost of the equipped wells bears a direct relation to the value of the water which he apportioned between the water and the land, one to four.

Mr. Hunt, who had been occupied in appraisement work in Kern county since 1934, testified that the net return from the 900 acre tract should be apportioned four parts to the land and one part to the water; that over a period of years he had noticed that the rental rates on land in this particular end of the valley had been based on a one-fifth of the crop to the landowner as a general rule where water was not developed on the land; that in any event, the value of the water should not be more than the cost to develop it.

Mr. Moore, a real estate broker of thirty-eight years experience, and a resident of Kern county for about fifty-five years, testified that he was familiar with the rental of irrigated lands where equipped wells were being furnished by the landowners and where equipped wells were furnished by tenants; that he had made an examination of the premises; that he would apportion the net return from the water and the land, one-fifth to the water and four-fifths to the land.

Mr. Hobson, a certified public accountant with thirty years experience, testified that an allocation made in accordance with accounting principles should be upon the basis of costs, not values; that the gross amount received by Scott and Stahl from their project arose from three elements—land, water and management; that he had determined the cost of the land to Scott and Stahl, the cost of the water and of management and that the net should be allocated as follows: 47½% to the land, 22½% to the water and 30% to management. In this connection, it may be observed that the allocation on the basis of a crop lease is substantially the same as the result obtained by Hobson's method of accounting and apportionment.

One of the circumstances supporting the conclusion of the trial court is that when Scott's lease of the 80 acres expired on August 1, 1942, he purchased a ten acre parcel directly south and a ten acre parcel directly north of the 80 acres, and that he drilled a well on each of these ten acre parcels and produced water in substantially the same quantities as produced by the first two wells. It is apparent, therefore, that water could have been produced on the 900 acres as well as on the 80. Under such circumstances, a much greater proportion of the net fruits of the land and water should be allocated to the land than to the water.

[2] After reviewing the foregoing testimony and other evidence received in support of the judgment, we cannot say as a matter of law that there was no substantial evidence to support the judgment. While there was evidence contradicting the testimony of witnesses for defendant, it merely created a conflict which the trial court determined in favor of the defendant. It is not the province of this court to determine conflicts in the evidence, nor to choose between different inferences which may be drawn from the testimony. People v. Hills, 30 Cal.2d 694, 701, 185 P.2d 11.

[3] As was said in Fackrell v. City of San Diego, 26 Cal.2d 196, 207, 157 P.2d 625, 631, 158 A.L.R. 773: "The findings of the trial court must be sustained if they are supported by substantial evidence. All legitimate and reasonable inferences must be indulged toward upholding the findings. Appellate courts, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover whether such doubt or conflict exists, the court should be realistic and practical. (Estate of Bristol (1943), 23 Cal.2d 221, 223, 143 P.2d 689.)"

The judgment of the trial court appears to us to be a practical and equitable solution of the problem presented. It appears that pursuant to a stipulation of the parties, the surface rights in the 80 acres, exclusive of the oil, gas and mineral rights, are to be conveyed to Scott for the sum of $10,000. Plaintiffs then, under the judgment, receive this amount for the land; they retain their mineral rights; and in addition, recover $4,971.60. We cannot say that such a disposition of the controversy is unreasonable and unsupported by the evidence in view of the entire record before us.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

102 Cal.App.2d 666

PARR et al. v. SWANSON.

Civ. No. 17748.

District Court of Appeal, Second District, Division 3, California.

March 6, 1951.

William Parr, doing business as General Music Company, sued H. N. Swanson for a balance due under a written contract to buy coin-operated musical instruments and amplifiers from plaintiff. Defendant filed a counterclaim for a sum paid by him before the parties' alleged rescission of the contract. From a judgment of the Superior Court of Los Angeles County, William R. McKay, J., for defendant on the complaint and counterclaim, and an order vacating an order granting plaintiff's motion for a new trial, plaintiff appealed. The District Court of Appeal, Wood, J., held that the trial court erred in vacating the order granting a new trial, that the appeal from the judgment presented moot questions, and that the order vacating the order granting a new trial was appealable.

Order vacating order granting motion for new trial reversed, and appeal from judgment dismissed.

1. New trial 🔑117(1), 155

A notice to plaintiff of entry of judgment for defendant on certain date was not proper notice of actual entry of such judgment on following day and was ineffectual to start 60 day period within which motion by plaintiff for new trial might be granted, but such period should be counted from date of filing of plaintiff's notice of intention to move for new trial, so that granting of motion within 60 days after filing of such notice was timely and motion was not denied by operation of law because of failure to grant it within 60 days after service of notice of entry of judgment, and court erred in vacating order granting motion.

2. New trial 🔑165

The trial court erred in vacating its order granting motion for new trial, in absence of showing that such order did not express court's actual judicial intention when it was made and entered.

3. Judgment 🔑340

A court may not vacate its own judgment in order to correct a judicial error, except under appropriate statutory procedure.

4. Appeal and error 🔑843(2)

Where trial court's order, vacating its order granting plaintiff's motion for new trial after judgment for defendant, must be reversed by appellate court, plaintiff's appeal from judgment need not be considered, as questions presented thereby are moot.

5. Appeal and error 🔑82(3)

An order vacating order granting new trial is appealable as a special order made after final judgment. Code Civ.Proc. § 963.

6. Appeal and error 🔑839(2)

Where two actions between same parties were not consolidated for trial, but were tried as separate cases, separate judgments were rendered for plaintiff and defendant, respectively, and defendant did not move for new trial or appeal from judgment for plaintiff, such judgment cannot be reviewed on plaintiff's appeal from judgment for defendant, though two cases were tried as one on motion and stipulation by counsel for both parties.

◆

Edward H. Blixt, Los Angeles, for appellant.

George W. Rochester, Los Angeles, for respondent.

PARKER WOOD, Justice.

This is an action to recover $3,254.64, being the balance allegedly due upon a written contract whereby defendant agreed to buy from plaintiff 150 Solotone boxes (coin operated musical instruments) and 15 amplifiers.

In his answer the defendant denied that he executed the agreement alleged in the complaint. As a first separate defense he alleged that he agreed to buy said musical instruments upon the condition that plaintiff would place the instruments in locations selected by plaintiff subject to the approval of defendant and upon further condition that such locations prove profitable to defendant; that pursuant to the agreement six instruments were placed on location, and when the location proved unprofitable the possession of the instruments was returned to plaintiff; that plaintiff failed to place the instruments in a profitable location, and the contingency provided for in said agreement failed. He alleged as a second separate defense and by way of counterclaim that plaintiff failed to place the instruments in profitable locations, and defendant and plaintiff rescinded the contract and agreed to credit the defendant with the sum of $3,041.72 theretofore paid by defendant.

The court found that the parties did not enter into the contract alleged in the complaint; that the allegations of the first and second separate defenses and the counterclaim are untrue, except that on September 26, 1947, defendant gave to plaintiff $3,041.72 in cash; that said allegations were untrue for the reason there was no meeting of the minds of plaintiff and defendant upon any of the alleged transactions. It was adjudged that plaintiff take nothing by his complaint; and that defendant have judgment against the plaintiff on his counterclaim for $3,041.72.

Plaintiff appeals from the judgment and from an order vacating and setting aside an order granting plaintiff's motion for a new trial.

The said order from which plaintiff appeals is as follows: "On the court's own motion, the motion for a new trial having been heretofore granted in the above entitled case as vacated and set aside because of lack of jurisdiction on part of the court to make such motion [sic], said motion having herefore been automatically denied by operation of law as provided in section 660 CCP."

Appellant (plaintiff) contends that the motion for a new trial was not denied by operation of law, and that the court erred in setting aside the order granting the motion for a new trial.

Judgment was entered on July 27, 1949. On July 26, 1949, counsel for defendant caused a notice of entry of judgment to be mailed to counsel for plaintiff. That notice, which was dated July 26, 1949, stated: "On this day judgment was signed and entered in favor of defendant and against plaintiff in the sum of $3,041.72 with interest thereon at the rate of 7% per annum from date hereof until paid." On August 5, 1949, plaintiff filed a notice of intention to move for a new trial. On September 16, 1949, the motion for a new trial was heard and submitted, and on September 27, 1949, the motion was granted.

In order to explain the proceeding which was before the trial court when the court of its own motion set aside the order granting a new trial, reference should be made to another case between the parties. Another action by this plaintiff against this defendant (No. 541246 in superior court), upon an open book account for $2,615.19, was called for trial at the same time the present action was called for trial. The actions were not consolidated for trial. It was stipulated that the evidence received in case No. 541246 should be heard and considered by the court in its determination of case No. 543273 (the present case). Plaintiff's counsel stated that he wished to try case No. 541246 first. After he had presented his evidence in that case, the judge asked him if he wanted to proceed in the other case. He replied that he would rather finish "this one" (No. 541246) and present evidence in the other case later. The court said: "All right. You want to try one and then the other." Defendant's counsel then stated that defendant admits that he owes plaintiff for the open book account ($2,615.19). He also said that defendant had a credit of $3,041.72 because the parties had agreed to cancel the contract to purchase the musical instruments and had agreed to apply the $3,041.72, paid thereunder, on the open book account. After further evidence was presented, separate judgments were rendered. Judgment in case No. 541246 was for plaintiff for $2,615.19. Judgment in case No. 543273 (the present case) was, as hereinabove stated, that plaintiff take nothing by his complaint and that defendant have judgment on his counterclaim for $3,041.72.

On October 19, 1949, after plaintiff's motion for a new trial in the present case had been granted (on September 27th), defendant filed a notice of motion to set aside the judgment against defendant in case No. 541246. It seems, from an affidavit of counsel for defendant in support of the motion, that said motion was made upon the theory that since the two cases allegedly were heard "together and jointly," the court, in granting plaintiff's motion for a new trial in the present case, should have given some consideration to the judgment against defendant in the other case, and that it was irregular and unfair to let that judgment stand after granting a new trial to plaintiff in the present case. In other words, it seems to be the theory of defendant that if a motion for a new trial was properly granted in the one case, then a new trial should have been granted in the other case. Defendant did not make a motion for a new trial.

[1] Defendant's said motion to vacate the judgment in case No. 541246 was heard on October 25, 1949, and was dismissed by the court. Also at the hearing of that motion, the court of its own motion made the order (hereinabove quoted) setting aside the order granting plaintiff's motion for a new trial in the present case. As above indicated, one of the questions on this appeal is whether the motion for a new trial had been denied by operation of law at the time the trial court granted the motion for a new trial. In other words, a question is whether the 60-day period within which a motion for a new trial may be granted had expired when the motion was granted. The answer depends upon whether or not a proper notice of entry of judgment was given. It seems that the judge, in setting aside the order granting a new trial, considered that notice of entry of judgment had been given on July 26, 1949, the date the notice of entry of judgment was mailed to plaintiff's counsel, or on July 27th, the next day after the notice was mailed. If either date was the proper date from which to compute the 60-day period, then the 60-day period within which the motion might have been granted expired on September 24th or 25th. In either event, since the motion was granted on September 27th, the motion would have been denied by operation of law before the order granting the motion was made. It is to be noted that the notice of entry of judgment stated that the judgment had been entered on July 26, 1949. The judgment was not entered on that date and had not been entered when the notice was mailed. The judgment was entered on July 27, 1949. The notice of entry of judgment which was served on plaintiff was not a proper notice of the entry of the judgment herein, and the notice was ineffectual to start the 60-day period within which a motion for a new trial might be granted. That period should not be counted from the date of service of that notice but should be counted from August 5, 1949, the date plaintiff filed his notice of intention to move for a new trial. The time within which the motion for a new trial could be granted expired on October 4, 1949. Since the motion was granted on September 27th, the motion was granted within the proper time and it was not denied by operation of law. The court erred in making the order of October 25th setting aside the order granting the motion for a new trial.

[2, 3] Irrespective of whether the motion for a new trial had been denied by operation of law, the court erred in setting aside the order granting the new trial. The order granting the motion for a new

trial had been entered, and there was no showing that the order as entered did not express the actual judicial intention of the court at the time it was made and entered. It appears that the court in setting aside the order granting the new trial was attempting to correct an alleged judicial, as distinguished from a clerical, error. Even if the order granting the new trial had been erroneous, the court was not empowered to set aside the order. It is established that a court may not vacate its own judgment in order to correct a judicial error except under appropriate statutory procedure. Barlow v. City Council of Inglewood, 32 Cal.2d 688, 693, 197 P.2d 721; McMahan v. Baringer, 49 Cal.App.2d 431, 432, 122 P.2d 63.

[4] The order setting aside the order granting the motion for a new trial must be reversed. In view of that conclusion, and since the order granting a new trial was effective, it is not necessary to consider the appeal by plaintiff from the judgment. The questions presented by the appeal from the judgment have become moot.

[5] Respondent (defendant) asserts that the order vacating the order granting a new trial is not appealable. An appeal may be taken from a special order made after final judgment. Code of Civ.Proc., sec. 963. The order vacating said order granting a new trial is such a special order. This contention of respondent is not sustainable.

[6] Respondent also asserts in effect that "the counting of the days between the notice of entry of judgment and the running of the 60 days is academic," and that since the two cases (the present one and No. 541246) were "tried as one by the lower court on motion and stipulation by counsel for Appellant and counsel for Respondent," this court should decide the merits of the appeal "on the judgment rolls, exhibits and transcript of the two causes of action." As above shown, the two cases were not consolidated for trial but were tried as separate cases, and separate judgments were rendered. Defendant did not make a motion for a new trial, and he did not appeal. Under such circumstances this court cannot review the judgment in the other case, No. 541246.

The order of October 25, 1949, vacating and setting aside the order granting the motion for a new trial is reversed. The appeal from the judgment is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

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102 Cal.App.2d 619

MARKS v. ROWLEY.

Civ. 17817.

District Court of Appeal, Second District, Division 1, California.

March 5, 1951.

Joe M. Marks brought action against J. B. Rowley to recover a real estate broker's commission. The Superior Court, Los Angeles County, Orlando H. Rhodes, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that where listing form for sale of realty contained printed agreement that vendor would pay broker's commission no matter who sold property, but words "open listing" were written in, the written words controlled, and, therefore, vendor could sell property through another agent without becoming liable for plaintiff's commission.

Judgment affirmed.

1. Brokers 🔑55(3)

Where listing form for sale of realty contained printed agreement that vendor would pay broker's commission no matter who sold the property, but printed words "exclusive listing" were stricken and the words "open listing" were written in, the written words were controlling and printed agreement repugnant to definition of open listing was disregarded, and therefore vendor could sell property through another agent without becoming liable to pay commission to broker. Civ.Code, § 1651.

2. Brokers ⚿85(7)

In broker's action for commission based on listing form contract containing written words "open listing," the Reference and Guide Book of the State Real Estate Division, which division of the state government administers the real estate law, defining open listing, was properly admitted into evidence. Business and Professions Code, §§ 10000–11658.

◆

Samuel Schekman, Santa Monica, for appellant.

M. Lewis Lehman, Los Angeles, for respondent.

DRAPEAU, Justice.

On September 25, 1948, plaintiff, a licensed real estate agent, telephoned defendant for permission to list for sale a motel owned by him. Defendant agreed to give plaintiff an open listing. Thereupon, plaintiff mailed to him the Los Angeles Realty Board's official printed form of "exclusive listing" for sale of realty. Before doing so, plaintiff had altered this form by adding at the top the words "Open Listing" and by striking the word "exclusive" from the body of the instrument where it appeared twice. This printed form so altered was accompanied by a note from plaintiff, to-wit: "Dear Mr. Brawley: Please sign open listing, both copies enclosed. Return original. I will hold price firm. * * * Please keep me advised of any developments, and I will do the same to you."

Upon receipt, defendant signed the listing, but before returning it to plaintiff he struck out the phrase having reference to a termite clearance.

Those portions of the printed form which appointed plaintiff the irrevocable agent of defendant from September 25th to November 30th, 1948, and agreed to pay him a 5% commission "If a purchaser ready, willing and able to purchase * * * said property is procured by said agents or by anyone else including myself", were left unchanged.

During the period covered by the listing, the motel was sold by another agent to whom defendant paid a commission.

By the instant action, plaintiff sought to recover a commission of 5% on the sale, based on the terms of the listing agreement.

The trial court found that defendant was to pay plaintiff a commission only in the event plaintiff procured a buyer ready, willing and able to buy the motel prior to November 30th, and prior to its being otherwise sold; that it was not understood or agreed that "if a purchaser was procured by plaintiff or anyone else, including the defendant" during the terms of the agency, plaintiff was to receive a commission; that the buyer of the property was not obtained in any way through the efforts of plaintiff, and that he did not at any time obtain a buyer ready, willing and able to purchase the motel.

From a judgment in favor of defendant, plaintiff appeals.

"The sole question" asserts the appellant, "is simply this. Where words used in a listing are clear and unequivocal and state that the owner will pay the agent five per cent (5%) even if the owner sells the property himself, can the court completely disregard such words and hold that the two words 'open listing' are controlling and supersede all other material in the body of the agreement."

It is quite obvious from an examination of the agreement, which was introduced in the lower court as an exhibit, that the parties attempted to alter a printed form of exclusive listing into an open listing agreement. And that in so doing, they failed to delete the words upon which appellant bases his claim: That he should receive a commission if a purchaser were procured by him or by anyone else, including the respondent.

Section 1651 of the Civil Code appears to provide a reasonable method for interpreting the instant contract: "Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form. And if the two are absolutely repugnant, the latter must be so far disregarded."

Respondent testified that when appellant "asked me for the listing, I said he could have an open listing—that other brokers had it. I could not give him anything else but an open listing."

The Reference Book and Guide (1948 Revision) published by the State Division of Real Estate was introduced in evidence. On page 64 of that work appears the following definition of an open listing: "An open listing is a listing general in form which merely sets forth the statement as to the condition of the property, its size, location, and the amount desired for the sale price, and it may be with or without a time limit, and with or without notice to the brokers in case of sale. An open listing, therefore, does not require the seller to notify any of the brokers with whom the property is listed, in order to prevent liability of paying a second commission, as the sale of the property itself automatically cancels the listing. The commission in an open listing goes to the broker who first finds a buyer. In the event the owner finds a buyer the owner is not obligated to pay a commission to a broker who later secures a buyer."

[1] It is conceded by both sides that this was to be an open listing. In any event, the written words to that effect in the document are controlling, and the printed matter therein contained which is repugnant to the definition of an open listing agreement must be disregarded.

[2] There is no merit in appellant's argument that the Reference and Guide Book of the State Real Estate Division was improperly admitted in evidence. That particular division of the state government administers the Real Estate Law, Business & Professions Code, sections 10000–11658, including the licensing of real estate agents and brokers.

In Estate of Atwell, 85 Cal.App.2d 454, 468, 193 P.2d 519, 527, where the construction given by the State Controller to certain sections of the State Inheritance Tax Law was being considered, the court stated: "The construction so given the law, while not controlling, is most persuasive of the correctness of our conclusion."

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and HANSON, Justice pro tem., concur.

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102 Cal.App.2d 760

CUGAT v. CUGAT et al.

Civ. No. 18176.

District Court of Appeal, Second District,
Division 1, California.
March 9, 1951.

Lorraine Cugat brought action for divorce against Xavier Cugat and others and the named defendant, who was not served with summons, appeared specially with motion to vacate prior order confirming ex parte order appointing receiver to take charge of the named defendant's property, and to vacate prior orders directing receiver to pay money to plaintiff, issued pursuant to orders to show cause which were never served on the named defendant. Defendant's motion was denied and he appealed. Plaintiff moved to dismiss appeal. The District Court of Appeal, Hanson, J., pro tem., held that where trial court refused to vacate prior orders, court's action in effect was a final judgment, and hence the order denying defendant's motion was an appealable order.

Motion to dismiss appeal denied.

1. Constitutional law 🔑309(1)

If husband was not served with summons in wife's divorce action and trial court issued order confirming ex parte order appointing receiver over husband's property, and orders directing receiver to pay money to wife, pursuant to orders to show cause which were not served on husband, such orders took husband's property without due process, even if husband had personal knowledge of every move made by wife in the case.

2. Appeal and error ⚿82(3)

Where husband allegedly was not served with summons, in wife's divorce action, and trial court issued order confirming ex parte order appointing receiver over husband's property, and orders directing receiver to pay money to wife, pursuant to orders to show cause which allegedly were not served on husband, order denying husband's motion to vacate orders was in effect a final judgment, and therefore was appealable. Code Civ. Proc. § 963.

3. Constitutional law ⚿309(1)

Property of an individual may not constitutionally be taken from him by a court order or judgment without due process, which embodies legal notice, whether the action is one for divorce or otherwise.

◆

Pacht, Tannenbaum & Ross, and Samuel I. Barchas, Bernard Reich, and Leo Altshuler, all of Beverly Hills, for appellant.

Gold & Needleman and J. George Gold, Philip Feldman, all of Beverly Hills, for respondent.

HANSON, Justice pro tem.

The question we are called upon to decide is whether the defendant in a divorce action who was not served with summons and who appeared therein only specially with a motion to vacate certain prior orders entered against him without legal notice thereof may appeal from the order denying his motion.

The orders issued by the court, pursuant to its orders to show cause which were never served upon the defendant, and which were challenged by him upon the ground the court was without jurisdiction to make them, were as follows: (1) An order confirming an ex parte order appointing a receiver to take charge of defendant Cugat's property within the jurisdiction of the court; (2) orders entered by the court directing the receiver to pay out of moneys and properties owned by him the sum of $2,000 per month to the plaintiff for her support, to her attorneys the sum of $12,000 as counsel fees, and the further sum of $500 as costs.

The plaintiff-respondent is here with a motion to dismiss the appeal from the order involved on the ground it is not an appealable order upon any of the grounds set forth in Section 963 of the Code of Civil Procedure. The contention is devoid of merit.

[1,2] The orders of the court which were challenged by the defendant, if his contentions are correct, not only took from him his property without due process, but such orders were final as to him when the trial court refused to vacate them. In effect the action of the court was a final judgment and hence is appealable under the code section in question. De la Montanya v. De la Montanya, 112 Cal. 101, 44 P. 345, 32 L.R.A. 82; Hibernia Savings and Loan Society v. Ellis Estate Co., 216 Cal. 280, 13 P.2d 929.

[3] The fact, if it be a fact, as plaintiff-respondent contends, that the defendant had personal knowledge of every move made by the plaintiff in this case is completely immaterial. The property of an individual may not constitutionally be taken from him by a court order or judgment without due process—which embodies legal notice—whether the action is one for divorce or otherwise.

The motion to dismiss the appeal is denied.

WHITE, P.J., and DRAPEAU, J., concur.

102 Cal.App.2d 583

BOBYS et al. v. MESTER et al.

Civ. 17557.

District Court of Appeal, Second District,
Division 3, California.
March 2, 1951.

Action by Pat Bobys, and others, against Rupert C. Mester, and others, for declaratory determination that an establishment owned by plaintiffs had been decontrolled or excepted from the effects of the Federal Emergency Price Control Act. The Superior Court, Los Angeles County, Stanley Mosk, J., rendered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Bartlett, J., held that substantial evidence supported finding that plaintiffs' establishment was not a hotel, and consequently was not decontrolled or excepted from the effects of the Federal Emergency Price Control Act.

Judgment affirmed.

1. Appeal and error ⚷931(1)

On appeal from judgment entered on finding for defendants, all conflicts must be resolved in favor of defendants and all legitimate and reasonable inferences indulged in to uphold trial court's findings.

2. Appeal and error ⚷1010(1)

If there is any substantial evidence in the record which, taken in its most favorable light to the finding of the trial court, justifies that finding, then it is duty of an appellate court to affirm the judgment based thereon.

3. Landlord and tenant ⚷200(1½)

In action by landlords against tenants for declaratory judgment that landlords' establishment had been decontrolled or excepted from the effects of the Federal Emergency Price Control Act, substantial evidence supported finding that landlords' establishment was not a hotel, and consequently was not decontrolled or excepted from the effects of the Federal Emergency Price Control Act. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A. Appendix, § 901 et seq.; Housing and Rent Act of 1947, §§ 1 et seq., 202(c), 50 U.S.C.A.Appendix, §§ 1881 et seq., 1892(c).

Gold & Needleman, Beverly Hills, for appellants.

Charles S. Callahan, Beverly Hills, for respondents.

BARTLETT, Justice pro tem.

The appellants in this action filed a complaint for declaratory relief against some of their tenants asking the court to hold that an establishment owned by them in Beverly Hills, California, had been decontrolled or excepted from the effects of the Federal Emergency Price Control Act of 1942, as amended by the Housing and Rent Act of 1947, 50 U.S.C.A.Appendix, §§ 901 et seq., 1881 et seq.

In their opening brief appellants clearly and succinctly state the issues as defined by the pleadings as follows: "Appellants are the owners of 'The Adelon,' a three-story building located at 152 South Peck Drive, Beverly Hills, California, containing certain housing accommodations consisting of 30 residental units. Prior to June 30, 1947, the housing accommodations in this establishment were subject to the Federal Emergency Price Control Act of 1942, as amended. On July 1, 1947, the Housing and Rent Act of 1947 was enacted into law by the Federal Government, which law excepted from further rent control, housing accommodations which are located in an establishment which is commonly known as a hotel in the community in which it is located, and which are occupied by persons who are provided customary hotel service.

"The material issues of fact presented by the pleadings and upon which the Court ruled and upon which this appeal is based are those contained in paragraph VI of the complaint which are denied by paragraph III of the answer are:

"1. Was 'The Adelon' on June 30, 1947, commonly known as a hotel in the community in which it is located?

"2. Was 'The Adelon' on June 30, 1947, providing customary hotel service to the persons who occupied it?"

The portion of the Housing and Rent Act of 1947 under which appellants claim their establishment had been decontrolled or excepted from the Federal Rent Control Act of 1942 was as follows: "(c) The term 'controlled housing accommodations' means housing accommodations in any defense-rental area, except that it does not include—

"(1) those housing accommodations, in any establishment which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service". Title II, sec. 202.

The court, in regard to the issues in controversy, made the following finding: "1. That on June 30th, 1947, and for a long period of time prior thereto, the *Adlon* Apartments was not commonly known in the community where it is located as a hotel and was not an establishment which provided for its guests the customary hotel services, but, on the contrary, the premises is known in the community as an apartment house."

[1, 2] The sole question raised by appellants in this appeal is the sufficiency of the evidence to support this finding of the trial court. It is a well established rule which has been stated time and again, that all conflicts must be resolved in favor of the respondents and all legitimate and reasonable inferences indulged in to uphold the findings of a trial court. No matter what conflicts exist, if there is any substantial evidence in the record which, taken in its most favorable light to the finding of the trial court, justifies that finding, then it is the duty of an Appellate Court to affirm the judgment based thereon. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183.

Upon the issue as to whether The Adelon on the 30th day of June, 1947, was commonly known as a hotel in Beverly Hills, we find the following evidence in the record. It was listed in the telephone book for May, 1947, as follows: "Adelon Apts. —152 South Peck Drive, Beverly Hills, Crestview 59748". On the premises the only indication of the name was a small placque which said "The Adelon". It was stipulated that all the linen in the premises except, possibly, sheets, was marked "Adelon Apts." Several witnesses, called by the appellants, testified that the establishment was commonly known as an "apartment-hotel". In direct conflict to this testimony witnesses for the defendants testified that it was known as an apartment house and referred to as "The Adelon Apartments".

[3] Upon the issue as to whether or not The Adelon on that date provided customary hotel service to the persons who occupied it, testimony which we will now refer to appears in the record. There was no secretarial or desk service. The manager of the apartment house did have an apartment in the building which had a sign on the door reading "Hours 10 to 12; 2 to 4 closed Thursday". Between 6 in the evening and 7 in the morning the front door of the building was locked and there was no access to the lobby unless some tenant or the manager admitted the caller by a buzzer system. There was a self-service elevator and no elevator boy. There was no switchboard in the lobby but there was a public pay telephone in the hall and it was necessary for anyone wanting to use this telephone to come to the floor upon which it was located. The result was that the tenants of 16 out of the 30 units in the building had private telephones installed. There was no bellhop service. Tenants bought their own electric light bulbs, toilet paper and soap. One of the tenants testified that the maid service consisted of a visit each Tuesday when a woman came to the apartment, changed the bed linen, then went into the bathroom and wiped the floor. Her husband went to the kitchen and wiped the floor there and they had a vacuum cleaner with which they went around the rest of the apartment; that the whole matter did not take over 25 or 30 minutes a week. There was further testimony that the tenants washed their own windows. "No repairs were made under any circumstances". No one carried packages upstairs or downstairs for the guests. No one connected with The Adelon delivered packages to the tenants or delivered messages to them and when furniture, carpets or drapes wore out no replacements were made. This is not all of the testimony on this subject and there was a conflict as to some of the testimony which we have recited. It is sufficient to show, however, that the court had before it substantial evidence upon which to base its finding. This case is typical of those cases to which the rule of law we have set forth is applicable.

The judgment is affirmed.

SHINN, P. J., and WOOD, J., concur.

102 Cal.App.2d 597

MOHAMED HOSI v. LA VEY et al.

Civ. 14623.

District Court of Appeal, First District,
Division 2, California.
March 5, 1951.
Rehearing Denied April 4, 1951.
Hearing Denied April 30, 1951.

Action by Mohamed Hosi against William B. La Vey, and others, for damages for injuries sustained in automobile accident. The Superior Court, in and for the City and County of San Francisco, Robert McWilliams, J., rendered judgment for defendants and plaintiff appealed. The District Court of Appeal, Schottky, J., held that evidence supported finding that motorist and pedestrian were both negligent, but that pedestrian's negligence proximately caused his injuries.

Judgment affirmed.

1. Appeal and error 🔑931(1), 989

In determining correctness of finding, on appeal, the prevailing party's evidence must ordinarily be accepted as true and evidence which is contradictory must be disregarded.

2. Appeal and error 🔑1008(1)

In action by pedestrian against motorist for injuries sustained when struck by motorist while crossing street outside of cross walk, whether motorist was guilty of wilful or wanton misconduct was question for trial court.

3. Automobiles 🔑244(50, 58)

In action by pedestrian against motorist for injuries sustained when struck by motorist while crossing street outside of cross walk, evidence justified finding that pedestrian was negligent in crossing street, and such negligence proximately caused his injuries.

4. Automobiles 🔑227(1)

In action by pedestrian against motorist for injuries sustained when struck by motorist while crossing street outside of cross walk, where evidence did not indicate that motorist had a last clear chance to avoid accident, after discovery of pedestrian's peril, failure to apply last clear chance doctrine was not error.

◆

Henry C. Clausen, San Francisco, for appellant.

Joseph T. O'Connor, Harold H. Cohn, San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment in favor of defendant in an action for damages for injuries arising out of an automobile accident. The trial court, sitting without a jury, found that defendant was negligent but that plaintiff's negligence proximately contributed to his injuries.

[1] Appellant makes a number of contentions but they all in effect are that the evidence does not support the judgment in favor of defendant but on the other hand require a judgment in favor of plaintiff. It is a rule too well established to require the citation of authorities that before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may reasonably be drawn therefrom, and excluding all evidence and inferences in conflict therewith, it still appears that the law precludes

the rendering of judgment in favor of such prevailing party. The evidence must be construed most strongly against the losing party and every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true and evidence which is contradictory must be disregarded. Bearing in mind this familiar rule which is too often not properly evaluated by counsel who insist upon arguing the weight of conflicting evidence before an appellate tribunal, we shall give a brief summary of the evidence.

The accident occurred on a clear day in broad daylight at about 5:30 p. m. on 16th Street between Mission and Valencia Streets in San Francisco. At the intersection of 16th Street with Mission and Valencia Streets traffic signals were in operation. Between Mission and Valencia Streets there are a number of alleys which do not cross 16th Street. All of these alleys contain a roadway of less than 30 feet, except Julian Avenue which contains a roadway of exactly 30 feet. It was stipulated that the traffic code of San Francisco provides that an alley is a street with a roadway of less that 30 feet. Appellant was a pedestrian and with a companion walked from Mission Street down 17th to one of these alleys known as Hoff Street, then north on Hoff to 16th Street, and thence west on 16th to a point where another of these alleys known as Rondel Place comes to an end at 16th Street. There appellant testified that he looked to the right and to the left and saw no car approaching, so he and his companion proceeded across 16th Street. There is no cross-walk at this point but there was evidence that many people crossed 16th Street there. He testified further that when he had reached a point between the car tracks he again stopped and looked to the right and to the left, that everything seemed to be clear, and that he then continued across the street. At this time respondent was driving westerly on 16th Street between Mission and Valencia at a speed which he testified was 25 miles per hour but which another witness placed at 35 miles per hour. He testified in his deposition, which respondent introduced in evidence, that he did not see appellant until he was 7 or 8 feet from him, that he then put on his brakes and was going about 10 miles per hour when the right side of his car struck appellant. Appellant testified that he did not see respondent until after he was hit by the car. Respondent did not sound his horn. There was evidence that after the impact respondent opened his window and swore at appellant and then drove away, although respondent testified that he did not know he had struck appellant. The accident occurred about 50 feet east of Valencia Street.

The trial court found among other things, that respondent negligently, carelessly and recklessly operated his automobile at said time and place; that appellant was unaware and oblivious of the proximity of respondent, and that respondent did not know of the situation of appellant until he got within 10 feet of him; and appellant was careless and negligent in that he carelessly and negligently proceeded across 16th Street without reasonable or ordinary care for his own safety, which carelessness and negligence proximately concurred with the carelessness and negligence of respondent and proximately contributed to any damage suffered by appellant.

Appellant first argues that the court committed reversible error in not finding respondent guilty of wilful and wanton misconduct. He asserts that respondent did not appear personally at the trial to testify and "produced no evidence whatever to disprove the claims of negligence and wanton misconduct". He argues that, therefore, "contrary to the usual case the evidence must be construed favorably to appellant."

[2] This contention of appellant is so lacking in merit that we need only point out that, while respondent did not appear at the trial, his deposition consisting of 30 pages of testimony was introduced into evidence, and that the question of whether respondent was guilty of wilful or wanton misconduct, was a question of fact for the

trial court. There is nothing in the record of the instant case which compels a finding that respondent was guilty of wilful or wanton misconduct.

[3] Appellant's counsel's second contention is that the finding of the court that appellant was negligent is not supported by the evidence. He states that he was an illiterate foreigner, 63 years old who for 23 years worked as a freight yard mechanic, and should only be held to the standard of care exercised by a reasonable man of appellant's class. No high degree of intelligence is necessary to enable a person to cross a street, and there is nothing in the record to indicate that appellant was either physically or mentally deficient. Upon the record here there is ample evidence to justify the court in concluding that appellant was negligent in proceeding to walk across the street at the point where he did when respondent's car was approaching. The court could well have doubted appellant's statement that when he was between the tracks in the middle of the street he looked to the right and saw no car approaching. Appellant's witness Brown, who was crossing the street behind appellant, saw respondent's car 100 feet away and testified "I stepped back myself because he was traveling pretty fast, and I got back a way to let him get by." It is difficult to understand how appellant, if he looked, could have failed to see respondent's car, if Brown saw it. We believe that the question of the negligence of respondent and the contributory negligence of appellant were questions of fact for the trial court to determine, and that there is ample support in the record for the findings of the court upon these issues.

[4] Appellant's final contention is that the court committed reversible error in not applying the doctrine of last clear chance to the demonstrated facts in the case. The difficulty with appellant's argument upon this point is that appellant is assuming facts contrary to findings of the court which are supported by the record. There is nothing in the record to justify or compel a finding that after respondent was aware of the peril of appellant he had a last clear chance to avoid the accident. It is doubtful whether, upon the record here, it would have been proper to submit the issue of last clear chance to the jury, if there had been a jury in this case, but there is no doubt whatever that the trial court had a right to weigh the evidence and conclude that the doctrine of last clear chance was not applicable.

Appellant has made an able and earnest argument upon the facts and the weight of the evidence, and if the judgment had been in favor of appellant his argument would be very helpful in pointing out evidence in support of the judgment. However, as an appellate tribunal our power in this case begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion of the trial court. We are convinced that, while the trial court might well have decided in favor of appellant, the judgment in favor of respondent finds ample support in the record.

Judgment affirmed.

GOODELL, and DOOLING, JJ., concur.
Hearing denied; SHENK, J., dissenting.

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102 Cal.App.2d 689

PEOPLE v. HUBLER.

Cr. 4546.

District Court of Appeal, Second District,
Division 1, California.
March 7, 1951.

Rehearing Denied March 19, 1951.

Charles Hubler was convicted in the Superior Court, Los Angeles County, Charles W. Fricke, J., of kidnapping, of assault with a deadly weapon and of robbery, and he appealed. The District Court of Appeal, White, P. J., held, inter alia, that the robbery conviction was sustained by the evidence.

Affirmed.

1. Robbery ⚷24(1)

Under rule that all elements of corpus delicti may be proved by presumptive or circumstantial evidence, commission of robbery is sufficiently established by proof that victim had valuables on her person at time of being assaulted, beaten, and rendered unconcious, and that they were missing when she regained consciousness.

2. Robbery ⚷22

In robbery prosecution, jury was entitled to draw inference from facts legally proved, and on such deduction from those facts as was warranted by, among other considerations, usual propensities or passions of people and course of nature. Code Civ.Proc. §§ 1958, 1960.

3. Robbery ⚷22

In robbery prosecution, where evidence was sufficient to support finding that defendant had kidnapped prosecuting witness and committed assault upon her with deadly weapon, and there was evidence that victim's purse had been found under railroad culvert a few blocks away from scene of crime, jury's inference that after assault perpetrator of assault had taken personal property from his victim, was only reasonable inference that could be predicated upon proven facts. Code Civ.Proc. §§ 1958, 1960.

4. Criminal law ⚷1159(2)

It is not within province of appellate tribunal to retry case and make inferences from facts proved, but that function belongs to trier of facts, and appellate court is limited to deciding only whether, upon face of evidence, it can justly be held that sufficient facts could not have been found to warrant inference of guilt.

5. Criminal law ⚷1144(13)

Appellate court must assume, in favor of verdict, existence of every fact which jury could have reasonably deduced from evidence, and then determine whether such facts are sufficient to support verdict.

6. Robbery ⚷24(1)

Robbery conviction was sustained by evidence.

◆

Al Matthews, Doris R. Baker, Harold J. Ackerman and Robert P. Dockeray, all of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information containing four counts filed by the District Attorney of Los Angeles County, defendant was charged in Count I with the crime of kidnapping; in Count II he was accused of the crime of robbery; Count III charged the crime of assault with a deadly weapon with intent to commit murder; and in Count IV he was accused of the offense of assault with intent to commit rape. To all of the aforesaid charges defendant entered a plea of not guilty, and the cause proceeded to trial before a jury. At the conclusion of the testimony, on motion of the district attorney, Count IV of the information was dismissed.

By the jury's verdict the defendant was found guilty as charged in Counts I, II, III. Count III was reduced to the crime of assault with a deadly weapon. Motion for a new trial was denied. From the judgments of conviction, defendant prosecutes this appeal.

Stating the facts in a light most favorable to the prosecution as we are required to do following a guilty verdict, we find in the record testimony that on March 4, 1950 at about 8:30 p. m. the prosecuting witness, a 23 year old woman, was accosted by defendant near the intersection of Liberty Boulevard and Beechwood Avenue in the City of Southgate, Los Angeles County. She had departed from her home about 8:20 p. m. to board a bus. She first noticed defendant across the street from her on Liberty Boulevard as she walked towards the bus stop. She noticed that this man was wearing a light jacket and dark trousers. The area was well lighted. As she crossed Beechwood Avenue she heard footsteps behind her but continued walking on Liberty Boulevard. She moved over to allow the person behind her to pass. As this individual passed her, she noticed he was the same man whom she had previously seen on the opposite side of the street. This man, identified by the complaining witness as the defendant herein, turned and stopped the complainant by pointing a small nickel-plated revolver at her. According to her testimony, she tried to scream but was unable to do so because she was "paralyzed with fear". Defendant stepped forward and grabbed her right arm, held the gun against her side saying, "Don't scream or I'll shoot". He further stated, "I won't hurt you. I just want to suck your tits". Shortly thereafter defendant suggested sexual intercourse and the complaining witness refused. Defendant then forced her to walk with him on Liberty Boulevard in an easterly direction to the northwest corner of the intersection at Beechwood Avenue. At this point they crossed Liberty Boulevard and continued walking on the avenue. Defendant took a more firm grip upon the complaining witness's arm, stating, "If you try to scream or back away I'll shoot". Defendant inquired where the complainant lived to which she answered that she lived nearby and requested him to release her. They turned the corner at Poplar Place and continued walking near the schoolgrounds. At the end of this street there is situated a garage and a motel. Defendant stated to the complainant that he could not let her go because he "might get caught". He stated further that he could not trust anyone. According to her testimony the complaining witness was thoroughly frightened and hung back. Defendant turned her around and "coaxed" her to go in an easterly direction. Again she drew back and he stated that he would not harm her.

Suddenly, standing very close to the complainant and facing her, defendant started unbuttoning her blouse. Becoming impatient he ripped the blouse open and inserted his hand inside her brassiere. Again defendant made suggestive statements of a sexual nature. During all of this time, according to her testimony, the witness was in fear of the defendant. He walked her across a parking lot beside the motel. He continued to hold her arm and point the gun at her side. He walked her to the rear of the motel. The witness testified, "I still wouldn't look at him. I was trying to think of some way to get away and I was paralyzed. I just couldn't move or speak or anything, and as I stood there out of the corner of my eye, I saw the flash of the gun as he raised it past my right temple and from the position of it I knew instinctly he was going to strike me and I put both hands up to protect my head and I screamed and he struck me and I remember being struck twice before I lost consciousness and that is all I remember".

A few minutes later, she regained consciousness, arose and walked across the parking lot to the motel office where she called the police.

The complainant was taken to the Maywood Hospital where a bullet was removed from her brain and where she received treatment for a fractured finger. As a result of the bullet wound, the complaining witness suffered a ruptured macula of the left eye destroying the power to focus that eye. Complainant testified that she was with the defendant for about ten minutes before she was shot.

Prior to the time she was accosted by defendant the complainant was carrying a "purse and a present". The purse was black in color and inside thereof was a smaller red purse or wallet containing $11.00. She did not see either the purse or the wallet again until the police later returned them to her. When she regained consciousness at the scene of the crime both purses were missing. None of the money was ever recovered.

At the trial the complaining witness positively identified defendant as the man who accosted and shot her and also recognized a jacket introduced at the trial as being similar to the one worn by defendant on the night in question.

A young boy testified that he found the complainant's small red wallet beneath a railroad culvert the day after the attack upon the complaining witness took place. This culvert was about five or six blocks east of the aforementioned motel. The youth was walking along the tracks when he noticed the red wallet beneath the culvert and retrieved it. He testified that he noticed no other objects in the immediate vicinity and that there was no money in the wallet.

A deputy sheriff testified that a jacket taken from the defendant's room at a college in San Luis Obispo was the one heretofore referred to as having been identified by the complaining witness as being similar to the one worn by her assailant.

The same deputy sheriff had two conversations with the defendant concerning the matters here involved. When the officer began his conversation with the defendant the latter immediately asked if they were immigration authorities. Upon receiving a negative reply he asked if he was being arrested for burglary. In conversation with deputy sheriffs defendant told them he had enrolled in the San Luis Obispo college on Wednesday, March 8, but had been at the college since the preceding Sunday, March 5. When asked when he retired on March 4, the defendant answered, "No, no, no you don't. I won't talk about it, and besides I was home that night." Although defendant freely answered questions concerning his actions during a few months prior to March 4, when direct questions were addressed to him concerning the evening of March 4 he refused to discuss the matter at all. In a subsequent conversation, defendant denied having seen the complaining witness on March 4 and stated that he had an alibi for that night. Finally, however, defendant said he was at a lady's home on the evening in question.

On April 1, a deputy sheriff took the defendant to the home of a girl with whom he claimed to have been on March 4 from 7:30 to 11 p. m. He told the officers to go upstairs to a certain door and they would find Alice Sims to be the girl. The officers went to the apartment and when they returned to the police car advised defendant that the information they had was that he never spent an evening alone with that girl. They stated that they had information that this girl was afraid of defendant, to which he replied, "So that's what it is." The fact was, however, that the officers had no conversation with Alice Sims because she was not at home, but they talked to her sister.

At the trial Alice Sims testified that she knew defendant but that he was not in her company on March 4, 1950 between the hours of 6 p. m. and 12 midnight. Cross-examination revealed that he had been in her company on other occasions and that she was not afraid of him.

When officers confronted defendant with the complainant and she accused him of committing the crimes charged against him, the latter said nothing in answer to her accusations.

Testifying in his own behalf, defendant stated that on March 4, 1950, at approximately 8:30 p. m. he was in the home of Mrs. Louise Turner watching television. He flatly denied all of the charges against him. On cross-examination he testified that he told the officers he was with Alice Sims on Saturday, March 4, but he meant the previous Saturday. With reference to the date of March 4, defendant testified that he did not leave the premises of the Turner residence at any time except to go to the store, which was around 4:30 or 5:30 p. m.

Defendant's mother testified that on the date charged in the information he was at the Turner home watching television. She recalled this date because he remarked that a cowboy picture had been the best one he had ever seen. That the time was 8:30 p. m. This she remembered because of the next program she watched which started at 9:30 p. m. The witness testified that they watched the television until 10:30 p. m.

Mrs. Turner testified that defendant and his mother lived with her in her apartment. That on March 4 defendant was in the house watching the television and she recalled that at 7:30 p. m. and again at 9:30 p. m. specific programs were watched and that she discussed the programs with the defendant.

In rebuttal, Officer Outhouse testified that on March 30 he had a conversation with Mrs. Turner at her home in which she was asked if there was a blue Plymouth coupe at her house, to which she answered in the affirmative. She stated that it had been there approximately a month. That it had been brought there on the night of the first Friday in March, 1950, which was the third. The witness stated that defendant had driven the car on a Saturday before he went to school. The officer testified that upon checking the calendar, Mrs. Turner agreed that the Saturday in question was March 4. When asked at what time the car left the premises, the officer testified that the witness stated that defendant merely started the car, went out for a few minutes and brought it back because it was not operating right and that defendant then left in his truck. The officer further testified that when asked what time defendant left the place she stated she did not recall the time of day but that it was shortly after dark. When asked what time defendant returned to her residence she stated she didn't know what time he returned but he had not returned when she retired at about 11 o'clock.

Appellant concedes that the evidence is sufficient to support the convictions of the crime of kidnapping as charged in Count I, and the crime of assault with a deadly weapon, a lesser and necessarily included offense within the crime charged in Count III. His sole contention on this appeal is that the evidence is insufficient to support the conviction of the crime of robbery, as charged in Count II of the information. In this regard, appellant urges "that there is no evidence sufficient to establish the fact that the defendant was the person who removed the purse from the immediate presence" of the complaining witness. That the victim did not see appellant take the purse from her possession. That it was not found in his possession, but was later found under a railroad culvert, a few blocks away from the scene of the crimes.

[1] In 46 Am.Jur. 162, it is said, "Under the rule that all the elements of the corpus delicti may be proved by presumptive or circumstantial evidence, which prevails in most jurisdictions, it has been held that the commission of a robbory is sufficiently established by proof that the victim had valuables on his person at the time of being assaulted, beaten, and rendered unconscious, and that they were missing when he regained consciousness."

[2, 3] In the instant case, the jury was entitled to draw an inference from the facts legally proved, and on such a deduction from those facts as is warranted by, among other considerations, the usual propensities or passions of people and the course of nature, Code Civ.Proc. secs. 1958, 1960. Under the facts proven herein it was only reasonable for the jury to assume and infer that after the assault upon the complainant and while she was unconscious, the perpetrator of the assault took the personal property from his victim. It is only reasonable to assume, in the light of human experience and the propensities of people, that had some other person seen the complaining witness lying bloody and unconscious upon the ground, such a person would have come to her aid. The inference drawn by the jury was the only reasonable inference that could be predicated upon the proven facts with which we are confronted in the case at bar.

[4, 5] It is not within the province of an appellate tribunal to retry the case and to make inferences from the facts proved. That function belongs to the trier of facts. The appellate court is limited to deciding only whether upon the face of the evidence it can justly be held that sufficient facts could not have been found to warrant the inference of guilt. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. And, "we must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict". People v. Newland, supra, 15 Cal.2d at page 681, 104 P.2d at page 780.

[6] Being unable to say that upon no hypothesis whatever is there substantial evidence to support the verdict and conclusion of the jury, the judgments and each of them must be affirmed. It is so ordered.

DRAPEAU, J., and HANSON, Justice pro tem., concur.

102 Cal.App.2d 627

PEOPLE v. VETRANO.

Cr. 4540.

District Court of Appeal, Second District, Division 1, California.

March 5, 1951.

Hearing Denied April 3, 1951.

Frank Vetrano was convicted of incest in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., and he appealed. The District Court of Appeal, Second Appellate District, White, P. J., held that the evidence was sufficient to sustain conviction and that admission of testimony of similar acts involving same parties covering period of two and a half years was not reversible error.

Judgment affirmed.

1. Criminal law ⚷1159(2)

An appellate tribunal cannot brand testimony as improbable on its face or unbelievable per se in absence of claim that something had been done that it would not seem possible could be done under circumstances described, or that falsity in testimony is apparent without recourse to inferences or deductions, and unusual circumstances are not inherently improbable.

2. Incest ⚷14

Evidence sustained conviction of incest.

3. Criminal law ⚷1159(2)

Trial court's decision cannot be set aside on ground of insufficiency of evidence unless it is made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached by trial court.

4. Criminal law ⚷369(1)

Although evidence of other similar acts by person accused of sex crime with persons other than prosecuting witness ordinarily is inadmissible, testimony of similar conduct with complaining witness is admissible.

5. Criminal law ⚷369(8), 1169(11)

In prosecution for incest, testimony of prosecutrix regarding similar acts with defendant covering a period of two and one-half years was not inadmissible as too remote, and its admission did not constitute reversible error in absence of objection by defendant.

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Morris Lavine, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of the crime of incest. Following entry of a plea of not guilty and appropriate waiver of a jury the cause proceeded to trial before the court, resulting in the conviction of defendant. From the judgment of conviction this appeal is prosecuted.

The first ground urged for a reversal is that the evidence is insufficient to support the finding of guilt in that the testimony of the prosecutrix is inherently improbable. It therefore, becomes necessary to summarize the factual background which gave rise to this prosecution.

The record reflects that the complaining witness is the daughter of defendant, and at the time of trial was 15 years of age. She testified to several acts of sexual intercourse with her father.

The prosecutrix came to Los Angeles from Brooklyn, N. Y. approximately 2½ years prior to the date of trial. When she arrived in Los Angeles she went to live with her father at the home of her paternal aunt. Several other people were also living there. She and her father occupied a large room in the house which was divided into two portions by a partition. Defendant father slept in the smallest portion of the aforesaid room. According to her testimony, about a month after she arrived and while they were in these quarters, an act of intercourse took place between her and her father. Subsequent acts of intercourse took place in her portion of the room, mostly at night shortly after they had retired. According to the testimony of the complainant, some three months after she commenced to live in this room she made a complaint to her aunt and was given a different room, located next to the aunt. This arrangement continued for approximately two years. During this time, according to the testimony of the prosecutrix, no acts of sexual intercourse took place.

Thereafter, defendant and his daughter moved to quarters in a rooming house, consisting of one room with a bed and a cot. According to the prosecutrix, while living in this room acts of intercourse took place frequently, sometimes as often as two or three times each week.

During the month of February defendant and his daughter were living in this small room. According to her testimony, an act of sexual intercourse took place on or about Lincoln's Birthday of 1950 (this is the act charged in the information). At this time a girl friend of the complaining witness was also sleeping in the room. The complainant slept on the bed with her father and the girl friend slept on the cot.

On the night in question, the prosecutrix was sleeping beside her father and he asked her to have an act of intercourse with him. She testified that it was not a voluntary act of intercourse on her part because at first she refused, then yielded to defendant's persistence. The complaining witness testified that her father showed her a book relating to sexual intercourse entitled "Mother and Daughter". Defendant explained the pictures in the book and said that was one reason he did not want her to go out with boys. The complainant testified that "One time I said, 'Daddy, why do you do this to me, other fathers don't?" and he said, 'O, yes they do. A lot of them do' ". She further testified that she "was scared of him, especially when he used to get drunk".

It appears from the record that the complaining witness was 3½ years of age when her mother died. She lived in Brooklyn, N. Y. with her father and stepmother until she was eight and one-half years of age. Thereafter, when her father entered the Army she continued to live with relatives until 1947, when she was thirteen years of age, at which time, upon the request of her father, she came to live with him in Los Angeles. She testified that some three months after her arrival she had complained to her aunt, at whose house they were living, about what her father was doing to her. That she had arguments with her father about going out with boys; that her aunt also objected to her going around with a girl friend named Mary Ann. The prosecutrix admitted that on two occasions she stole money from her aunt Mary. That on the first occasion she stole 25¢, and another time $100. That with this money she bought jewelry and clothing.

At one time complainant's father took her to a school for girls. However, after purchasing uniforms and making other arrangements, she and her father decided that she would not attend this school. The prosecutrix was anxious to live at the home of her girl friend, Mary Ann, and had discussed the matter with the latter's mother. Defendant, however, refused to permit his daughter to live at the residence of the girl friend because of the claimed bad influence of the latter upon his daughter. There was testimony that the complainant had at one time told her aunt Mary that she hated her father, but upon being allowed to explain this statement the witness testified, "Well, for one thing, if my father was normal—I feel sorry for him in a way because I am telling the truth and all I can do is to get up here and tell it, and if they don't believe me there is nothing that can be done about it, I don't know, maybe he didn't mean to do what he did, maybe it just isn't his fault * * I don't dislike him".

In response to a further question, "Do you like him?" the complainant responded, "To a certain extent".

The witness further stated she told her aunt that she hated her father because she was afraid of him, that this fear was occasioned not from the punishment she received from him and his refusal to allow her to keep company with boys, but rather on account of her father's actions toward her. That her father would get intoxicated and "look at me as though he wanted to kill me".

A pelvic examination of complaining witness by a physician on February 20, 1950, revealed an old rupture of the hymen with an eversion of the hymen posteriorly. The vaginal orifice admitted the index finger easily, and it was the doctor's opinion that this finding was compatible with intercourse. The complainant's girl friend Mary Ann testified that she was 15 years of age. That on or about Lincoln's birthday in February, 1950, she remained over night with the complaining witness in the room occupied by the latter and defendant. That she was there three nights in all. She stated that on one evening defendant would not allow the two girls to sleep in the large bed. That he told both of them to sleep on the small cot, but on the night in question defendant told the complaining witness to sleep on the end of the large bed. That at that time, although the lights were off in the room, some light was coming through the window. The witness was unable to see "too clearly". She heard defendant ask, "Justine (his daughter's name), will you let me?"; that the complaining witness answered, "Let you what?". That defendant replied, "You know". That the prosecutrix then said, "No, go to sleep". That defendant "sort of got up like he was going over her. He got over her like, I couldn't see it all the way, but I saw him get up and get over the top of her, and then I didn't hear any more". At this time, according to her testimony, the witness was lying on the small cot in the room. In describing the defendant's actions the witness testified that "He stood like on his knees and you could see a big bulge of the covers". In answer to the question, "Did you see any motion there of any kind?" the witness testified, "I couldn't say for sure".

This witness testified that on the following morning she and the complainant made the bed, and that as they moved a pillow they observed "something under it"—a contraceptive.

Testifying on behalf of the defendant, his sister stated that in December of 1947 defendant brought the complaining witness to live at the sister's home. She testified that the sleeping arrangements were that the complainant slept on a folding bed in the vestibule, that defendant was not sleeping in the same room, but occupied another room in the house. That the room which complaining witness testified she occupied was in fact occupied by a friend of the witness. This witness, who was the aunt of the complainant, denied that the latter ever complained to her about her father's claimed advances toward her. She testified that the prosecutrix stole a total of $438 from her. She testified that she had told the complaining witness that her girl friend Mary Ann was not welcome in the house because "she runs around with the boys". This witness further testified that the complainant told her on several occasions that she hated her father. Defendant's sister finally ordered both him and the complainant out of the house because, as she testified, "I am having so much trouble with the boys around my house breaking flower pots and the bushes, you have got to get out of the house, you are making a nervous wreck out of me".

The testimony of this witness was corroborated in effect by one of the boarders at her house.

Defendant testified in his own behalf that his room at the residence of his sister had a private entrance. That his daughter, when she first came to California, slept in the vestibule on a couch. He denied that he at any time slept in a room next to that of his daughter. He denied that he had ever had any sexual intercourse with her. He testified that he had trouble with his daughter because she came home so late at night; that he punished her for this; that he admonished her to keep away from her friend Mary Ann; that he made arrangements to put his daughter in a boarding school but that the arrangements were never carried out because of his yielding to her pleas to him not to place her there. He testified to his refusal to permit his daughter to live at the home of her girl friend Mary Ann.

On the night here in question, according to defendant's testimony, the sleeping arrangements were that the visiting girl friend was on the cot and the complainant was at the foot of the large bed. That he woke his daughter up and what he said was, "Get your feet away from me". That thereupon she moved. That he knew the girl was not asleep and did say to her, "Come over here, I want to talk to you". That she said, "Don't bother me, I'm sleepy". That he further said, "I don't want Mary Ann to sleep here any more"; that the complaining witness replied, "Don't bother me, I'm tired". To which defendant testified he responded, "You are always tired when I want to talk to you". The defendant not only denied having sexual intercourse with the daughter on the evening charged in the information, but likewise on any other occasion.

With reference to the lighting conditions in the room on the night of the alleged offense, defendant testified that the lights were out and the room was very dark. That the only window was about 12 inches wide and 2 feet long. That there was a curtain on the window and that no light came through the window. After testifying that he was not married at the time here in question, defendant testified that he was "going out" with his own women friends.

On cross-examination defendant denied that he told a police officer that while residing at the home of defendant's sister he was occupying a bedroom with his daughter. He testified that his statement to the police officer was that they had two separate rooms. In rebuttal, a police officer assigned to the Juvenile Division of the Los Angeles Police Department testified that on February 10, 1950, he had a conversation with the defendant at the police station wherein defendant stated that he slept in the double bed and his daughter slept on the cot; that defendant further stated that he had slept with his daughter on one or two occasions when the latter's girl friend Mary Ann was present.

[1] In considering appellant's contention that the evidence is insufficient to sustain the court's decision finding him guilty because of the alleged inherent improbability of the testimony given by the prosecutrix and her girl friend, Mary Ann, it must be remembered that before an appellate tribunal can say that testimony bears upon its face the brand of improbability, or may be said to be unbelievable *per se,* it must involve, we think, a claim that something has been done that it would not seem possible could be done under the circumstances described, or that the falsity of such testimony is made apparent without recourse to inferences or deductions. And, evidence which discloses circumstances that are unusual cannot be said to be inherently improbable. Kidroski v. Anderson, 39 Cal.App.2d 602, 605, 103 P.2d 1000.

[2] While the testimony of the prosecutrix and her girl friend, Mary Ann, revealed a shocking and unusual state of affairs and undoubtedly afforded opportunity for a persuasive argument to the trier of facts against the reliability of such testimony, we see in it nothing from which a reviewing court could justly conclude that their testimony is *per se* unbelievable, and that it was, therefore, the duty of the trial judge, not only to wholly disregard it, but to accept appellant's testimony and that of witnesses in his behalf, or at least find that the appellant's guilt had not been disclosed by the evidence to a moral certainty and beyond a reasonable doubt. Human experience and many reported cases show that incestuous acts do take place. And because they do, section 285 of the Penal Code was enacted.

[3] When, as in the instant case, it may not justly and legally be held that the evidence on its face is, as a matter of law, insufficient to support the ultimate issue involved, the function of an appellate court is clearly set forth in the case of People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. Under the holding therein, before we can set aside the decision of the trial court on the ground of insufficiency of the evidence, "it is made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence

to support the conclusion reached in the court below". See also People v. Pettis, 95 Cal.App.2d 790, 794, 213 P.2d 731, 734. Under the facts and circumstances here present, we are without power to set aside, on the ground of insufficiency of the evidence, the conclusion arrived at by the duly authorized arbiter of the facts.

Finally, appellant earnestly insists that the court committed prejudicial error in permitting the prosecutrix to testify regarding alleged acts of intercourse with her father within a period of 2½ years prior to the offense charged against him, and which prior acts were not pleaded in the information.

At the trial, no objection was raised to the alleged vice of such testimony. While appellant's failure to object in the trial court might well be held to defeat his claim, urged for the first time on appeal, that the admission of such testimony was prejudicial error, People v. Calliham, 81 Cal.App.2d 928, 933, 185 P.2d 342, we are disposed to give consideration to such contention.

[4] While it has been held that evidence of other similar acts by an accused *with persons other than the prosecuting witness* ordinarily is inadmissible, People v. Asavis, 22 Cal.App.2d 492, 494, 71 P.2d 307, and cases therein cited, it is well established that our rule confining the testimony to the crime charged has been so far relaxed as to permit testimony of similar conduct *with the complaining witness.* People v. Asavis, supra, 22 Cal.App. at page 495, 71 P.2d 307.

The doctrine in this regard is thus declared in People v. Castro, 133 Cal. 11, 12, 65 P. 13, 14; "Where, as in this case, there is a continuation of the relation of intimacy and illicit intercourse between the parties to the offense, evidence of improper familiarity and adulterous acts both before and after the act charged is admissible. Such evidence is received to prove the adulterous disposition in the parties implicated. This appears to be the rule sanctioned by the weight of recent authority".

[5] Recognizing the reason for the foregoing rule, it cannot here be held, in the absence of objection by appellant in the trial court, that the testimony covering a period of 2½ years was too remote, or that its admission, under the circumstances here present, constituted reversible error.

For the foregoing reasons, the judgment is affirmed.

DRAPEAU, J., and HANSON, Justice pro tem., concur.

102 Cal.App.2d 708

In re CHESNEY'S ESTATE.

BOSWORTH et al. v. HARRIS.

Civ. 18144.

District Court of Appeal, Second District, Division 3, California.

March 7, 1951.

Proceeding in the matter of the estate of Viannia I. Chesney, deceased, by Melvin B. Bosworth, and wife, against Helen Harris to admit to probate last will of deceased. The Superior Court, Los Angeles County, John Gee Clark, J., rendered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that a confidential relationship existed between the beneficiaries of the will and testatrix and the relationship raised presumption of undue influence, which presumption was not overcome, and therefore probate of will was properly denied.

Judgment affirmed.

1. Wills 🔑**166(2)**

In action for probate of will of deceased, evidence substantiated findings that a confidential relationship existed between beneficiaries of will and decedent.

2. Wills 🔑**163(2)**

Where a confidential relationship exists and beneficiaries have been active in procuring execution of the will to their undue advantage, a presumption of undue influence arises, and the burden is cast upon beneficiaries to overcome presumption existing against them.

3. **Wills** ⟹166(1)

Evidence was sufficient to sustain finding that will was procured by undue influence of beneficiaries.

4. **Wills** ⟹82

A niece is not, from relationship alone, a natural object of the bounty of a decedent.

◆

John S. Bolton, Los Angeles, for appellants.

Dunnum & Dunnum, South Gate, for respondent.

SHINN, Presiding Justice.

Appeal from judgment denying probate of the last will of Viannia I. Chesney, deceased, by the proponents thereof, Melvin B. Bosworth and Helen S. Bosworth, husband and wife.

Mrs. Viannia I. Chesney, a widow, died testate on February 19, 1949. By her last will, dated December 4, 1948, she devised and bequeathed all her estate, real and personal, to appellants. Melvin B. Bosworth, named as executor, petitioned for probate of the will. Helen Harris, of Joplin, Missouri, a niece of decedent, filed opposition thereto, alleging that the will had been procured through undue influence exerted upon the decedent by proponents, that decedent was not of sound mind and that the will had not been duly executed.

Trial by jury was waived, and the court found that the testatrix, although gravely ill at the time of execution of the will, was of sound mind and that the will was executed in the manner required by law. It was found that a confidential relationship existed between testatrix and proponents; that the physical condition of decedent at the time was such as to permit of circumvention of her will; that proponents were active in procuring the execution of the will and unduly profited thereby to the exclusion of any relatives of decedent. It was concluded that the evidence was sufficient to prove the use of undue influence by proponents and that the will should be denied probate.

The record shows that Mr. and Mrs. Bosworth lived across the street from the Chesneys in Glendale and although the families were acquainted with each other, they did not become friendly until after Mr. Chesney's death. Mrs. Chesney, who was then about 75 years of age, lived alone. She received a small pension of about $51 a month and, for a time, some aid and assistance from the Masonic Lodge in the management of her affairs. In the spring of 1948, Mrs. Chesney, a woman of strong likes and dislikes, informed Mr. Vold of the Masonic Lodge that she no longer cared to have him assist her in any way. Her physical condition was impaired by reason of two strokes she had suffered and one side of her body was partially paralyzed so that she moved, talked and ate with difficulty. About this time, she sprained her ankle and as she was rendered unable to care for herself, Mrs. Bosworth began visiting her with items of food and doing her telephoning for her, since Mrs. Chesney had no telephone in her home. In the latter part of May, or early in June, Mrs. Chesney asked Mrs. Bosworth to call an attorney for her and instruct him to prepare her will. Mrs. Bosworth called an attorney who was a friend of the Bosworths and unknown to Mrs. Chesney. The will was dictated to the attorney by Mrs. Bosworth in accord with what she said were Mrs. Chesney's wishes. This will, executed on June 24, 1948, left a wardrobe trunk to Helen Harris, contestant here, and the balance of the estate to a sister-in-law of the decedent. During this time Mrs. Chesney was cared for by various housekeepers and nurses and by Mrs. Bosworth. In November Mrs. Chesney was worried about her finances and inquired of the Bosworths whether she could borrow money on her home. Mr. Bosworth told her it was doubtful, since she could show no ability to pay off a loan. Shortly thereafter, in the presence of his wife Mr. Bosworth proposed to Mrs. Chesney "that since she had liked us so well and trusted us" if she would deed the Bosworths her property they would borrow on it and use the money to take care of her in her home for the remainder of her days. After considering the matter Mrs. Chesney agreed and on November 18th the Bosworths caused an agreement and deed to be drawn by the attorney who had drawn the first will. Mr. Bosworth brought witnesses and a notary to Mrs. Chesney's home that evening, when the agreement and deed were executed. Present at the time were proponents, Mrs. Feather, the Housekeeper, a nurse, Mr. Farr, a neighbor and Mr. Sayre, a notary public. At this time, the June 24th will was formally revoked. Dr. Richardson testified that he called on Mrs. Chesney twice on November 18, 1948, and that she was extremely ill with acute heart failure. He stated that he thought another doctor had been called during the preceding night. No other doctor was called as a witness. At this time Dr. Richardson wanted to send the testatrix to a hospital but she refused to go. Shortly after receiving the deed to the property, the Bosworths borrowed $5,000 thereon and thereafter Mrs. Chesney's bills were paid by them. Neighbors testified that after the Bosworths took charge of the affairs of Mrs. Chesney the housekeeper, the nurse or Mrs. Bosworth were always with her and they were unable to speak with her alone.

Soon after the execution of the agreement and deed Mrs. Chesney told Mrs. Bosworth that she wanted to change her will so that everything she possessed would be left to the Bosworths. The last will (the one under consideration here), prepared by the same attorney at Mrs. Bosworth's direction, was executed on December 4, 1948, with Mrs. Bosworth's mother and son-in-law, and Mrs. Feather acting as witnesses. The will was read to Mrs. Chesney, who nodded her assent to its terms, then read it herself, and propped up in bed by Mrs. Bosworth, wrote her name in an almost illegible hand. Dr. Richardson testified that he was called to see Mrs. Chesney the next day and that she had apparently suffered another heart attack the previous night and was acutely ill.

[1-3] There is ample evidence in the record to substantiate the findings of the trial court that a confidential relationship existed between Mr. and Mrs. Bosworth and the decedent, that proponents were active in procuring the execution of the will and unduly profited thereby. Where such a confidential relationship is found to exist and the beneficiaries have been active in procuring the execution of the will to their undue advantage, a presumption of undue influence arises. In re Estate of Brown, 89 Cal.App.2d 496, 200 P.2d 888, and cases there cited. In such a situation, the burden is cast upon the beneficiaries to overcome the presumption existing against them. This the trial court held they failed to do. This court is empowered only to determine whether there is substantial evidence in the record to support the findings. From the foregoing brief summary of the evidence it clearly appears that a confidential relationship existed, that the testatrix was physically incapacitated, and apparently completely dependent upon the services of others, and that the Bosworths were active in procuring the execution of the will under which they benefited exclusively. Mrs. Bosworth gave instructions to the attorney, was present when the will was executed and, so far as the record discloses, Mrs. Chesney received no independent advice concerning the disposition of her property. There was no showing that the attorney ever consulted personally or at all with the testatrix concerning the terms of the will.

Appellants argue that they rendered faithful service to decedent and exhibited far more than neighborly kindness toward her; that respondent niece was not a natural object of her aunt's bounty and that it was not unnatural for them to be made sole beneficiaries. A niece is not, from relationship alone, a natural object of the bounty of a decedent, In re Estate of Nolan, 25 Cal.App.2d 738, 742, 78 P.2d

456, and respondent does not contend otherwise. The relations which existed between Mrs. Chesney and the respective claimants had a bearing upon the factual question of the use of undue influence. Even if we should agree with appellants that they had a better claim to recognition than respondent, this would not furnish a reason for disturbing the finding of the trial court upon the issue of undue influence. A reversal of the judgment upon the record that is before us would be without precedent.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

In re LOEWENSTEIN'S ESTATE.

LOWELL v. KUCHEL, Controller.

Civ. No. 18214.

District Court of Appeal, Second District, Division 2, California.

March 9, 1951.

Rehearing Granted April 2, 1951.

See 230 P.2d 882.*

Proceedings in the matter of the estate of Melanie L. Loewenstein, deceased, wherein Herbert D. Lowell, as executor, brought action against Thomas H. Kuchel, as controller, to determine liability of decedent's estate for inheritance tax. The Superior Court of Los Angeles County, Otto J. Emme, J., entered an order fixing the inheritance tax on decedent's estate, and Herbert D. Lowell appealed. The District Court of Appeal, McComb, J., held that there was a completed gift of principal of an interest income contract during lifetime of decedent, which was subject to taxation.

Affirmed.

1. Taxation 🔑866

Where decedent was beneficiary under interest income contract with power to anticipate principal upon obtaining written consent of donor or his legal representative, gift of principal became complete upon procurement of such written consent and was subject to inheritance tax as part of estate of deceased beneficiary. Revenue and Taxation Code, § 13641 et seq.

2. Insurance 🔑585(1)

Where interest income contract provided for succession to rights as beneficiary thereunder and for power to anticipate principal in first beneficiary upon consent of donor or his legal representative, exercise of that power terminated all rights of subsequent beneficiaries.

3. Taxation 🔑891½

In action to determine liability for inheritance tax on principal of interest income contract which allowed decedent to anticipate principal upon written consent of donor or his legal representative, where such consent was given, evidence tending to show consent by successor beneficiary to anticipation of principal by decedent was for limited purpose only was properly excluded.

◆

Frank M. Gunter, Beverly Hills, for appellant.

James W. Hickey, Sacramento, Morton L. Barker and Walter H. Miller, Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal by the executor of the estate of Melanie L. Loewenstein, who is the decedent's son and sole distributee of her estate, from an order fixing the inheritance tax on her estate.

Facts: On October 15, 1939, Henry Meis obtained from the Connecticut Mutual Life Insurance Company an interest income contract No. 4430. The terms of this contract provided that the company agreed to retain the amount of $68,828.54, and pay interest thereon monthly at 3% to Melanie L. Loewenstein during her lifetime and after her death to her husband Daniel Loewenstein during his lifetime, and after the death of the survivor of such persons to their son, appellant Herbert D. Lowell (formerly named Herbert D. Loewenstein), throughout his lifetime.

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* Subsequent opinion 230 P.2d 882.

The agreement further provided that upon the death of the last survivor of those three persons the company would pay the amount then retained to the then surviving widow of said son, or if there be no such widow to the then surviving children of said son in equal shares, or if there be no such children then surviving, one fourth to the University of Cincinnati, one fourth to the Cincinnati Art Museum, one fourth to Hebrew Union College and one fourth to the Jewish Hospital, with certain other provisions which are not here material.

It also provided that prior to November 16, 1939, or after October 14, 1940, decedent "with the written consent of said Henry Meis, or if he be deceased, with the written consent of the legal representative or representatives of said Henry Meis, may require the company to pay to her order any portion of the amount retained, interest payments on the amount so paid thereupon to cease."

The agreement concluded with the following statement: "Except as herein specified, said proceeds left with the Company shall not be subject to withdrawal during the lifetime of any payee."

On October 24, 1947, that decedent's request, appellant, Charles Levy and Sidney J. Eisman, the latter two as executors of the estate of Henry Meis, executed a document reading in part as follows:

"Whereas said Melanie L. Loewenstein desires to have the right and power to require The Connecticut Mutual Life Insurance Company to pay to her order from time to time such portion or all of the amount retained by said Company pursuant to said agreement; and Whereas Herbert D. Loewenstein (now Herbert D. Lowell) is fully satisfied that his mother Melanie L. Loewenstein shall have such right and privilege and joins in this agreement for the purpose of giving such consent; and Whereas Charles Levy and Sidney J. Eisman, as Executors of the Estate of Henry Meis, deceased, are agreeable to such payments to Melanie Loewenstein and join in this agreement for the purpose of giving their written consent to such payments to Melanie L. Loewenstein: * * *."

During her lifetime decedent did not require the company to make any payments to her. The inheritance tax collector levied a tax upon the principal amount of the policy payable to appellant.

Question: Were the proceeds of the policy properly subject to tax pursuant to Division 2, Part 8, Chapter 4, Article 3, (§ 13641 et seq.) of the Revenue and Taxation Code?

[1] Yes. The document executed October 24, 1947, completed a gift of the proceeds of the contract from Henry Meis to decedent prior to her death. She could have at any time demanded that the complete amount on deposit with the company be turned over to her. The fact that she did not actually take possession of the sum due her did not prevent the gift from being complete. (Cf. Fisher v. Ludwig, 6 Cal.App. 144, 149, 91 P. 658.)

[2] All rights of beneficiaries were terminated when the representatives of Henry Meis' estate executed the document of October 24, 1947, requiring that the company pay decedent any and all sums due under the contract. Therefore since the property belonged to decedent and appellant received it after her death the estate was subject to the tax levied against it.

[3] There is likewise no merit in appellant's contention that the trial court improperly excluded evidence tending to show that appellant executed the document of October 24, 1947, under an agreement with his mother that she would not withdraw any money from the company without his consent and only then for his benefit, because it was unnecessary under the provisions of the contract with the insurance company for appellant to execute the document of October 24, 1947, it being necessary only that the representatives of Henry Meis' estate execute it. Therefore the motives of appellant in signing it were immaterial.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

102 Cal.App.2d 675

PEOPLE v. PATTERSON.

Cr. 2241.

District Court of Appeal, Third District, California.

March 6, 1951.

C. K. Patterson was convicted in Superior Court of Sacramento County, Coughlin, J., of possession of a deadly weapon by a prison inmate, and he appealed. The District Court of Appeal, Peck, J., held that giving of an extemporaneous instruction by trial judge which removed the element of knowledge of possession of the weapon by inmate from jury's consideration was error.

Reversed.

1. Convicts ⚿5

Knowledge of presence of weapon is an essential element of statutory offense of possession of deadly weapon by prison inmate. Pen.Code, § 4502.

2. Convicts ⚿5

In prosecution for statutory offense of possession of deadly weapon by prison inmate, instructions which made offense complete by presence of weapon in inmate's pocket or on his person, erroneously eliminated consideration by jury of element of knowledge by accused of presence of weapon. Pen.Code, § 4502; Const. art. 6, § 4½.

◆

Oscar A. Kistle, Public Defender, Sacramento, for appellant.

Gail A. Strader, Deputy Atty. Gen., for respondent.

PEEK, Justice.

Following a trial by jury, appellant was found not guilty of the crime of assault with a deadly weapon with the intent to murder, and guilty of a violation of section 4502 of the Penal Code, possession of a deadly weapon by a prison inmate. A codefendant, Mullen, who was charged with a like violation of said section 4502, was found not guilty. Patterson alone appeals from his judgment of conviction and from the order of the court denying his motion for a new trial.

A short summary of the evidence (the sufficiency of which is not attacked) shows that for approximately two years prior to the alleged act appellant Patterson and defendant Mullen had been threatened by the complaining witness Johnson, and that on the morning of the alleged offense Johnson stated to another inmate, from whom he endeavored to obtain a knife, that he was having trouble with Patterson. Some time thereafter as the inmates were standing in the noon hour chow line, an inmate, whom Patterson refused to identify, shoved something into his pocket, saying as he did so, "You had better take this, that guy [Johnson] is behind you and he is looking for trouble." Almost immediately thereafter Johnson attacked appellant who reached into his pocket, saw the point of a knife sticking out, pulled it out and told Johnson to drop the knife he was holding. In the ensuing fight Patterson admittedly cut Johnson with the knife he had so obtained.

Appellant contended throughout the course of the trial, which lasted seven days, that he had no knowledge of what the other inmate thrust into his pocket until the attack by Johnson. The record discloses no evidence to the contrary other than that of Johnson, who testified that he did not see Patterson or Mullen in the chow line; that he had had no arguments with either of the two defendants; that he had no conversation with any one on the morning of the fight concerning the defendants, and that he did not know who stabbed him.

Following the instructions by the court, the jury retired at 11 o'clock a. m. At 3:15 p. m. it returned requesting further "information on what constitutes self defense", whereupon the court discussed and re-read the instructions previously given on that phase of the case. At 4:45 p. m. it again returned requesting that certain testimony be re-read, and that the instructions on self defense be re-read. The court did so, and during the course of the re-reading of such instructions, gave further extemporaneous explanations thereof. At 5:55 p. m. when the jury again returned, the foreman stated:

"We would like a little more explanation of the section 4502 in the Criminal Code.

"The Court: As to the second count and the third count, is that right?

"Foreman Nilsson: Second count.

"The Court: All right, I will read it to you. Section 4502, and as far as pertinent to this case is as follows:"

" 'Every prisoner committed to a State prison who while at such prison', or any other State prison, that is any person in a State prison, 'possesses or carries upon his person or has under his custody or control any instrument or weapon of any kind commonly known as a blackjack, slingshot, billy, sand club, sandbar or metal knuckles or any explosive substance or any dirk or dagger or sharp instrument is guilty of a public offense."

After so reading, the court stated: "Now, I will read it to you again:"

Following the second reading of the quoted portion, the court, turning to Mrs. Ludwigsen, a member of the jury, said: "If you want to ask a question, you may ask it.

Juror Ludwigsen: Your Honor, I would like to know if there is any further definition of the term 'possession'. And under control, under his control."

In response to this query the court then stated as follows: "Well, if it is in his possession, that would be on his person. In this case the question for you to determine is as to whether or not these defendants or either of them had in their or in his possession a knife, and of course, you would have to, all twelve of you, would have to agree upon which knife he possessed, whether it is People's Exhibit 6 or People's Exhibit 7. Now, *under his control means to have control of it, but to have in his possession means to be on his person, in his hand or on his person or in his pocket; that is having it in his possession.* Now, do you think that makes it plain?

"Juror Ludwigson: Yes, Your Honor." (Italics ours.)

The sole contention of appellant is that the error of the trial court in omitting to give a formal instruction or definition of the term "possession" became all the more prejudicial by failure to include any mention of the element of knowledge in the oral instruction above quoted, since by that instruction the jury was, in effect, told that whether or not appellant had knowledge of the presence of the knife was immaterial because the fact of having the knife in his pocket constituted the crime.

In support of his contention appellant particularly relies upon People v. Gory, 28 Cal.2d 450, 170 P.2d 433, 436. In that case guards at a County Honor Farm found particles of marijuana in a locker located at the foot of defendant's bed which, although under his control, was by regulation always kept unlocked. At the conclusion of the trial the court read and re-read an instruction to the effect that in order for defendant to have possession of the prohibited article the jury must be convinced beyond a reasonable doubt that the defendant knowingly had such objects in his possession. Thereafter the court withdrew the instruction from the consideration of the jury. In reversing the case for that reason the Supreme Court said: "* * * knowledge of the *existence* of the object is essential to 'physical control thereof with the intent to exercise such control' and such knowledge must necessarily precede the intent to exercise, or the exercise of, such control." The court further pointed out that the principal fact relied upon by the prosecution was the finding of marijuana in defendant's unlocked box and the denial by defendant of any knowledge of its presence. Here we have a like situation, the principal fact relied upon by the prosecution was the possession of the knife which, according to defendant Patterson, was placed in his pocket by another inmate without his knowledge. Under similar circumstances said court, in the Gory case, stated, "it was the duty of the trial court, on proper instructions, to submit to the jury the question as to whether defendant had knowledge of the presence of the marijuana." Citing cases, 28 Cal.2d at page 457, 170 P.2d at page 437. It necessarily follows that it was likewise the duty of the court in the present case to so instruct the jury. In discussing further the problem so presented, the Supreme Court stated: "To fail to instruct on that point might well have misled the jury into believing either that knowledge was not essential or that any object found among defendant's personal effects was conclusively presumed to be there of his own knowledge. The error which would be involved in an express declaration to that effect is obvious, for knowledge is essential and though the finding of an object among defendant's effects would support an inference, it would not give rise to a conclusive presumption that the object was there with defendant's knowledge." 28 Cal.2d at page 457, 170 P.2d at page 437.

Here, again, as in the Gory case, the prosecution contends that the instructions must be considered as a whole and when so viewed it is apparent that the jury was properly instructed; and that the contention of appellant is so extreme and narrow as to come squarely within the provisions of section 4½ of Article VI of the Constitution. Particularly is this true they say since "the jury was properly instructed on the element of knowledge by the following instruction:"

"In every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence. The intent with which an act is committed is manifested by the circumstances connected with the offense and the sound mind and discretion of the person accused. All persons are of sound mind who are neither idiots, lunatics nor affected with insanity.

"As to the intent or intention with which an act is committed, if you find that such act was committed, such intent or intention is a matter entirely within the province of the jury, who must, from a full and careful consideration of the testimony and from all of the circumstances connected with the commission of the act, arrive at a determination as to whether such act was committed with a criminal intent."

The instruction so relied upon by the prosecution made no more reference to the necessary element of knowledge than the instructions in the Gory case, where it was said that the element "of knowledge in the sense required for a finding of guilt of the statutory offense involved, and it is questionable whether from mere connotation of the definition itself an inference of the necessity for such finding would arise." That court also observed that the situation was not clarified to an appreciable extent by another instruction which correlated defendant's guilt with "wilfully" having "in his possession" marijuana, and concluded its opinion with the comment:

"It may be possible to argue that taking the instructions as a whole, they were sufficient to have informed the jury in a general roundabout way that before defendant could be convicted of the statutory offense of the possession of marijuana, the evidence must show his *knowledge of the presence* of said property in his box; but since knowledge, in that limited sense, is an essential element of the offense, he was entitled under the circumstances to a specific instruction, such as the requested instruction 12, to clarify the situation.

"It therefore follows that the reading, rereading, and subsequent withdrawal of the requested instruction 12 constituted error and we are convinced, under the state of the evidence presented on this essential element of knowledge, that such error must be treated as prejudicial." 28 Cal.2d at pages 458, 459, 170 P.2d at page 438.

In his concurring opinion Justice Schauer, who was joined by Justice Carter, particularly pointed out that the *withdrawal* of the instruction was a *failure* to give the instruction.

[1, 2] Thus, it may well be argued that when the court, by its extemporaneous instruction, told the jury that possession meant merely the having of the knife *in his pocket,* it completely eliminated any consideration of the question of the necessary element of *"knowledge of the presence of the object* as embraced within the concept of 'physical control with the intent to exercise such control' ", as held in the Gory case.

The judgment and order are reversed.

ADAMS, P. J., and VAN DYKE, J., concur.

102 Cal.App.2d 624

COHEN v. COHEN.

Civ. 18324.

District Court of Appeal, Second District,
Division 1, California.
March 5, 1951.
Rehearing Denied March 21, 1951.

Divorce action by Bertha Cohen against Julian Cohen. From that portion of interlocutory judgment of divorce awarding certain community property to defendant, order denying a new trial, and order nunc pro tunc reducing the award for attorney's fees as set forth in judgment, plaintiff appealed, and defendant moved to dismiss the appeal. The District Court of Appeal, Hanson, J., pro tem, held that where defendant had not appealed, receipt by plaintiff of partial satisfaction of award made to her of community property did not bar appeal by plaintiff, since she would be entitled to retain the specific property awarded to her regardless of whether judgment was affirmed or reversed.

Appeal from order denying a new trial dismissed and motion to dismiss appeal from judgment and from order nunc pro tunc denied.

1. Appeal and error ⚿161

The general rule that voluntary acceptance of the benefits of a judgment bars prosecution of an appeal therefrom has no application where the benefits accepted are such that appellant is admittedly entitled to them or would not be affected or put in jeopardy by the appeal.

2. Divorce ⚿252

Trial court, having found that wife was entitled to a divorce on ground of extreme cruelty, was obliged to award her not less than one-half of the community property.

3. Divorce ⚿281

Where husband did not appeal, receipt by wife of partial satisfaction of award made to her of community property in interlocutory judgment of divorce did not bar appeal by wife from that portion of judgment awarding certain community property to husband and from order nunc pro tunc reducing the award for attorney's fees as set forth in judgment, since wife would be entitled to retain the specific property awarded to her regardless of whether judgment was affirmed or reversed.

4. Appeal and error ⚿110

An appeal will not lie from an order denying a new trial.

Jones & Wiener, Norman Soibelman, and Irvin G. Freeman, Los Angeles, for appellant.

Paul Gordon, Los Angeles, for respondent.

HANSON, Justice pro tem.

The respondent herein moves to dismiss the appeal taken in this case on the ground that appellant has received partial satisfaction of an award made to her of certain community property in an interlocutory judgment of divorce which was granted to her because of respondent's extreme cruelty.

The appeal is from (1) the portion of the judgment awarding certain community property to the respondent; (2) the order of the court denying a new trial to appellant; and (3) an order *nunc pro tunc* reducing the award for attorney's fees as set forth in the judgment from $750 to $400.

[1–3] The general rule that a voluntary acceptance of the benefits of a judgment is a bar to the prosecution of an appeal therefrom "has no application where the benefits accepted are such that appellant is admittedly entitled to them or would not be affected or put in jeopardy by the appeal." Schubert v. Reich, 36 Cal.2d 298, 223 P.2d 242, 243. The court having found that appellant was entitled to a divorce on the ground of extreme cruelty was obliged under the law of this state to award her not less than one half of the community property. Arnold v. Arnold, 76 Cal.App.2d 877, 174 P.2d 674. The partial record here presented, in support of the motion to dismiss, does not disclose whether the trial court did or did not award to the appellant property of a net value equal to her stat utory right. As respondent has not appealed it is self-evident that our determination of the appeal cannot take away any part of the community property award that was made to appellant, and that she will be entitled to retain the specific property awarded to her whether there is an affirmance or a reversal. If there is a reversal it can only be on the ground that all or a part of the community property awarded to the husband should have been awarded to the wife.

[4] It follows that the motion to dismiss the appeal from the judgment and from the order *nunc pro tunc* reducing the award for attorney's fees must be and it is denied, but that the appeal from the order denying a new trial must be and it is dismissed for the reason that no appeal lies from such an order.

WHITE, P. J., and DRAPEAU, J., concur.

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102 Cal.App.2d 742

SCHLYEN et al. v. SCHLYEN.

Civ. No. 17898.

District Court of Appeal, Second District, Division 3, California.

March 8, 1951.

Hearing Denied May 3, 1951.

Shirley D. Schlyen and Leo S. Schlyen, minors, by Fannie Carelli, their guardian ad litem, brought action against Alice Harriet Schlyen to have certain deed annulled, and to compel defendant to account for rents, issues and profits. The Superior Court of Los Angeles County, Charles B. MacCoy, J., rendered a judgment for the plaintiffs, and the defendant appealed, and the plaintiffs moved to dismiss the appeal. The District Court of Appeal, Per Curiam, held that judgment was merely an interlocutory judgment and that no appeal would lie.

Appeal dismissed.

Appeal and error 🔑80(4)

Judgment which annulled two joint tenancy deeds and restored and declared realty described therein to be part of estate of deceased, and which ordered defendant to account for all rents, issues and profits of realty, and which provided that on the accounting court should grant such other and further relief and make such other and further order as might be just and proper, and that court retained jurisdiction of the action, was an "interlocutory judgment" and not a "final judgment," and no appeal therefrom would lie.

See publication Words and Phrases, for other judicial constructions and definitions of "Interlocutory Judgment" and "Final Judgment".

Benjamin Elconin, Max Bergman, Los Angeles, for appellant.

Samuel W. Blum, Los Angeles, for respondents.

PER CURIAM.

Motion to dismiss appeal. The judgment from which an appeal was attempted annulled two joint tenancy deeds and restored and declared to be a part of the estate of David Schlyen, deceased, the real property described therein. It further ordered defendant and appellant, Alice Harriet Schlyen, to account for all rents, issues and profits of the real property from October 5, 1948 and to turn over the same to the representative of the estate of said decedent. The judgment also provided: "* * * and the court, upon such accounting, shall grant such other and further relief and make such other and further order as may be just and proper in connection therewith. The above entitled Court shall and hereby does retain and maintain continuing jurisdiction of the above entitled action, and of all of the parties hereto for all purposes in connection with such accounting, and the taking, the rendition, and the enforcement thereof, and to make such other and further order or orders in connection therewith as may be necessary and proper and to render a judgment in connection with such accounting." The ground of the motion to dismiss is that the judgment was interlocutory and not final, and hence is not appealable. The motion should be granted. Further judicial action will be required in the ascertainment of the amount due, if any, upon a just accounting and in the rendition of a money judgment therefor. All matters determined by the judgment will be reviewable on appeal from a final judgment when the same is entered. David v. Goodman, 89 Cal.App.2d 162, 200 P.2d 568.

The appeal is dismissed.

102 Cal.App.2d 593

PEOPLE v. BESOYIAN.

Crim. No. 4580.

District Court of Appeal, Second District,
Division 3, California.
March 2, 1951

Roy Besoyian was convicted of robbery in the second degree in the Superior Court, Los Angeles County, Otto J. Emme, J., and thereafter filed a petition for writ of error coram nobis. From an order denying the petition, the defendant appealed. The District Court of Appeal, Second Appellate District, Bartlett, J., held that the writ was properly denied because of defendant's lack of due diligence in failing to bring to trial court's attention his alleged insanity and in failing to discover date of crime as charged in the information.

Order affirmed

1. Criminal law 🔑997

Applicant for writ of coram nobis must show that facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered substantially earlier than time of motion for the writ.

2. Criminal law 🔑997

Alleged temporary insanity at time of changing plea of not guilty to a plea of guilty did not justify granting of writ of error coram nobis where petition alleged that defendant recovered his sanity before sentence, but nothing was then done to bring matter to attention of court.

3. Criminal law 🔑997

The defendant's alleged ignorance of true date of crime charged precluding establishment of an alibi did not justify issuance of writ of error coram nobis in view of defendant's lack of diligence in failing to discover date charged in information.

William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Donald D. Stoker, Deputy Atty. Gen., for respondent.

BARTLETT, Justice Pro Tem.

By an information filed August 12, 1949, the petitioner herein was charged with the crime of robbery and two prior convictions. He was arraigned on August 16, 1949, pleaded not guilty and denied the prior convictions. Subsequently the petitioner admitted the second prior conviction of robbery alleged in the information and the first prior conviction alleged therein was stricken. The case was tried on October 31st, November 1st and November 2nd of 1949. During the third day of the trial the petitioner asked leave of court to withdraw his plea of not guilty and enter a plea of guilty to a lesser offense. This permission was granted. The court found the crime to be robbery in the second degree and granted petitioner leave to file an application for probation. On December 1, 1949, a motion was made on behalf of petitioner to withdraw his plea of guilty and enter a plea of not guilty. This motion was denied. The court thereafter pronounced judgment. On July 14, 1950, petitioner filed his petition for a writ of error *coram nobis* which, after a hearing before a judge who had presided at all of the former proceedings in the case, was denied. At all stages of the proceedings the petitioner was represented by counsel of his own choosing.

Petitioner's contentions on appeal from the order of the court are set forth in his petition as follows: "Points upon which the appellant wishes to rely I That at the time of changing his plea from not guilty to guilty the appellant was deprived of his power of reasoning because of temporary insanity resulting from grief, worry, fear and confinement. II That not until the appellant had been sentenced and was in the penitentiary did he find out the true date of the crime charged against him. That had he known said true date he could have established an alibi defense."

[1, 2] After alleging that at the time appellant's attorney advised him to change his plea of not guilty to guilty of a lesser offense than the one upon which he was being tried, and that at the time he did so, appellant was temporarily insane, the petition alleges "that shortly thereafter and before sentence the defendant recovered his sanity and resultant ability to reason and think and attempted to withdraw his plea of guilty." However the petition further alleges "that said status was not brought to the attention of the court." In People v. Shorts, 32 Cal.2d 502, 197 P.2d 330, 336: "One who applies for a writ of *coram nobis* upon a ground such as the one here presented must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief." The petition itself therefore negatives any showing of diligence. When his counsel made the motion to withdraw the plea of guilty then was his opportunity to disclose to the court any such matter as his temporary insanity at the time of the changing of his plea. Also just before the pronouncement of judgment he had, as a defendant has in all cases, an opportunity to show legal cause why judgment should not be pronounced. This he failed to do.

[3] As to his second contention that he did not find out the "true date" of the crime charged against him until after he was in the penitentiary and that had he known the "true date" he could have proven an alibi, we are confronted with a record which shows negligence and an entire lack of diligence on his part. The information charged him with the crime of robbery committed on April 16, 1949, and he alleges that he thought he was charged with having committed the crime on April 18th. At the time of the arraignment his attorney waived the reading of the information. He states that he did not read it and was not informed of its contents. This contention is sufficiently answered in People v. Ingles, 97 Cal.App.2d 867, 218 P.2d 987, 990. In that case the defendant, a minor, pleaded guilty to a charge for which he had been held to answer and was set forth in the information but which it was conceded was different from that set forth in the complaint upon which he had originally been arrested. He pleaded guilty to the offense set forth in the information under the belief that it was the same charge which had been set forth in the complaint originally. It was contended that his youth and the fact that his attorney was not present when he was sentenced constituted reasons for his not discovering the error. The court held: "While his attorney waived the reading of the information by the clerk (a matter of common practice), if the attorney and appellant did not read it or compare it with the charge in the complaint, it was such a lack of diligence as would bar the right to *coram nobis.* * * * His lack of diligence in discovering the mistake as to the particular crime was entirely his own fault."

The petitioner in this case was a man of experience. He admitted a prior conviction of the crime of robbery and service of a term in the penitentiary. Furthermore he was present in court during over two days of trial when the case was presented against him and if he did not, during that time, notice the date of the happening of the crime of which he was charged, he certainly was negligently inattentive. That he did at that time learn of the "true date" is evident by one portion of his affidavit which, it is true, is inconsistent with other statements in the same affidavit. The portion referred to reads as follows: "Neither was he ever informed by counsel or by any other person to the best of his recollection and knowledge of the true date on which the crime charged against him was committed, nor did he learn the true date thereof *until his case was actually on trial.*" (Emphasis added.) That showing of due diligence required in the rule laid down in People v. Shorts, supra, has not been made here.

The order of the court denying defendant's petition for writ of error *coram nobis* is affirmed.

SHINN, P. J., and WOOD, J. concur.

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102 Cal.App.2d 662

PEOPLE v. KOZAKIS.

Cr. 4561.

District Court of Appeal, Second District, Division 2, California.

March 6, 1951.

Denys Kozakis was convicted in the Superior Court of Los Angeles County, Stanley Mosk, J., for the placing of wagers upon horse races and defendant appealed. The District Court of Appeal, McComb, J., held that the evidence was sufficient to sustain conviction.

Affirmed.

1. Criminal law 🔑369(2)

In prosecution for the making or taking of bets upon horse races, where the evidence showed that police officer saw several men enter defendant's shop and hand him money with a little slip of paper after which defendant placed the money in his pocket and made a telephone call, admission of evidence by police officer describing what a "phone spot" was and how it was used for the making of wagers over the telephone, was proper. Pen.Code, § 337a, subd. 3.

2. Criminal law 🔑369(2)

Evidence which tends logically and by reasonable inference to establish any fact material for the prosecution, or to overcome any material fact sought to be proved by the defense, is admissible although it may connect the accused with an offense not included in the charge.

3. Criminal law 🔑1036(1)

In prosecution for placing of wagers upon a horse race, where defendant did not object at time of trial to the receipt of two blank check forms with writings on the reverse side, any objection to evidence was waived, since an objection to the introduction of evidence could not be made for the first time on appeal. Pen.Code, § 337a, subd. 3.

4. Criminal law 🔑569

In prosecution for the placing of wagers upon a horse race, evidence failed to establish that defendant was entrapped to commit crime by a police officer. Pen.Code, § 337a, subd. 3.

5. Gaming 🔑98(1)

Evidence sustained conviction for the wagering of bets upon a horse race. Pen. Code, § 337a, subd. 3.

◆

Leland E. Zeman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Gilbert Harelson, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of violating section 337a, subdivision 3 of the Penal Code[1] after trial before a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

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[1] Section 337a, subdivision 3 of the Penal Code reads as follows: "Who, whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result,

Defendant urges the judgment should be reversed on two grounds, neither of which is tenable: First: that the court erred in receiving remote and prejudicial evidence; and Second: that the evidence presented showed that defendant was entrapped into the commission of the crime by a police officer.

Facts: Officer Xydias on October 26, 1949, entered defendant's coffee shop and card club. The officer was dressed in working clothes and had received, prior to his entering defendant's premises, a five dollar bill the serial number of which he and his partner, Officer Drake, had noted.

Upon entering the shop, Officer Xydias asked defendant if he knew anyone that might have a job open for a cook. Defendant replied that he did not, whereupon Officer Xydias went to the back of the premises and proceeded to play pinochle. While playing cards he noted several men hand defendant money with a little slip of paper folded in it, after which defendant placed the money in his pocket and made a telephone call.

After playing cards for some time Officer Xydias took a newspaper to the front counter of the shop and opened it to the racing form portion. Defendant came up to him and said, "Well, you better take that away, it doesn't look so good up front here. There might be someone looking." The officer then went back to a table and tore off a corner of the newspaper. On the piece of paper he made the notations, "B.M.7—'Not Very Much' 2w" with his initials "T.X." He explained that "B.M." stood for Bay Meadows, the "7" for the seventh race. "Not Very Much" for the name of a horse running in the 7th race at Bay Meadows that day, and the "2w" for two to win.

He then handed the premarked five dollar bill and the slip of paper to defendant who opened it, read it and said, "Two to win?" Defendant put the five dollar bill in his pocket and gave the officer three one dollar bills. Officer Xydias then left the shop and shortly returned with Officer Drake and placed defendant under arrest. Among the money found in defendant's pocket was the five dollar bill given him of Officer Xydias. There were two blank checks found near the cash register in the shop which had pencil writing on the reverse side.

Officer Xydias and defendant both spoke Greek fluently and after defendant's arrest he asked the officer why he had arrested one of his fellow countrymen, to which the officer replied it was his duty to arrest anyone who was in the wrong, whereupon defendant said, "Well, it will cost me a considerable amount of money for attorneys and time lost, and so on. Why cannot we settle it right here. I will be more than happy to give you $500 and you can walk out of the store."

Defendant admitted to Officer Drake that he had received the five dollars from Officer Xydias and stated that the names and numbers written on the back of the blank checks were the names of people and the amount of money each owed him.

Defendant's contentions: First: *(a) The court erred in receiving in evidence Officer Drake's testimony that a "phone spot" was "* * * a location that has usually two or more phones where a man might phone, one person or more answers phones when they ring, and accepts wagers over the telephone, records the wagers on professional betting markers; these phone calls come from various persons who have made contacts prior to that time and are acting as agents for this particular phone spot."*

This evidence considered in connection with Officer Xydias' testimony that he saw several men enter defendant's coffee shop, hand him money with a little slip of paper, after which defendant placed the money in

or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; * * *."

his pocket and made a telephone call, tended logically to give rise to a reasonable inference that defendant was engaged in the practice of receiving and making wagers, and tended to corroborate Officer Xydias' testimony that defendant had agreed to make a wager for him.

[1, 2] Such evidence was therefore properly admissible, the rule being well stated by Mr. Chief Justice Gibson in People v. Woods, 35 Cal.2d 504, at page 509, 218 P.2d 981, 984, as follows: "It is settled in this state that except when it shows merely criminal disposition, evidence which tends logically and by reasonable inference to establish any fact material for the prosecution, or to overcome any material fact sought to be proved by the defense, is admissible although it may connect the accused with an offense not included in the charge. People v. Dabb, 32 Cal.2d 491, 499, 500, 197 P.2d 1; People v. Peete, 28 Cal.2d 306, 314, 315, 169 P.2d 924."

It is therefore immaterial that the evidence might also have tended to prove defendant guilty of a separate and independent offense.

(b) The court erred in receiving in evidence people's exhibit 2 consisting of two blank check forms with writing on the reverse side.

[3] Defendant did not object to the receipt of such evidence at the time of trial, therefore any objection which might have been made to such testimony was waived. An objection to the introduction of evidence may not be made for the first time on appeal. (People v. Odom, 72 Cal.App.2d 72, 74, 164 P.2d 68.)

Second: *The evidence disclosed that defendant was entrapped by Officer Xydias.*

This contention is predicated upon the fact that defendant testified that he had four or five conversations with Officer Xydias during the afternoon at which times the officer requested him to place bets for him, and that he refused, but that finally the officer by his importunities wore him down.

Such contention is devoid of merit. Officer Xydias' testimony that he asked defendant *just once* to take the bet necessarily contradicted defendant's story that the officer had asked him on a number of occasions to take it, and the jury was entitled to believe the officer's testimony rather than that of defendant.

[4, 5] There is likewise no merit in defendant's contention that the intent to commit the crime originated in the mind of Officer Xydias. It was for the jury to determine from all of the evidence whether the intent originated in defendant's mind or in the officer's mind and its finding supported by substantial evidence, as in the instant case, is binding upon an appellate court. (People v. Lagomarsino, 97 Cal.App.2d 92, 97, 217 P.2d 124.)

The judgment and order are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

102 Cal.App.2d 736

In re JIANITOS' ESTATE.
PETSAKOS v. MANOS.

Civ. 14588.

District Court of Appeal, First District,
Division 2, California.

March 8, 1951.

Hearing Denied May 3, 1951.

Proceeding in the matter of the estate of John G. Jianitos, deceased, wherein Nicholas Stephen Petsakos, was contestant of the will of the deceased, opposed by Spiros Manos, individually and as executor of the estate of John G. Jianitos, deceased. The Superior Court of the State of California, in and for the City and County of San Francisco, T. I. Fitzpatrick, J., rendered a judgment for the contestant, and Spiros Manos, individually and as executor of the estate of John G. Jianitos, deceased, appealed. The District Court of Appeal, Nourse, P. J., held that evidence sustained finding that will was not executed in manner required by law.

Judgment affirmed.

1. Wills 🔑386

Where evidence on question of whether will had been executed in manner required by law, was conflicting, District Court of Appeal was bound by trial court's finding that will was not executed in manner required by law. Probate Code, § 50.

2. Wills 🔑302(1)

In will contest, evidence sustained finding that will was invalid for failure to comply with statute requiring that will be signed by testator in presence of both witnesses present at the same time, and that each witness must sign at request of testator and in his presence. Probate Code, § 50.

3. Wills 🔑118, 120, 123(5)

Statute requiring that will be signed or acknowledged by testator in presence of both witnesses, present at the same time, and that each witness must sign at request of testator and in his presence, must be strictly adhered to. Probate Code, § 50.

◆

Stanley P. Mamalakis, San Francisco, for appellants.

Heller, Ehrman, White & McAuliffe Eugene S. Clifford and William K. Coblentz all of San Francisco, for respondent.

NOURSE, Presiding Justice.

In this contest of a will three grounds of attack were raised—that the testator was of unsound mind, that the will was not executed in the manner required by law, and undue influence. The first ground was waived; the contest was tried by the court resulting in findings and judgment revoking the will on the other two grounds.

On the issue of undue influence appellant argues that the evidence shows nothing more than opportunity and suspicious circumstances, but we need not pass on that issue because the judgment must be affirmed on the second ground, even if we were to agree with appellant on the subject of undue influence.

The decedent had been employed for twenty-six years as a waiter for the Olympic Club in San Francisco. Respondent was employed at the same place as headwaiter during all that time; the appellant was a barber operating a shop in the same city. In October, 1947, decedent became ill and left this employment. On June 16, 1948, the purported will was executed in this manner—according to appellant's evidence the will was prepared by one Faso at decedent's request; these two then went to appellant's barber shop where another was asked to sign as a witness. The will shows that following the signature of the testator this one appeared as the first witness and the name of Faso followed. According to contestant's evidence the will was signed by the testator and the witness Faso, and then taken by Faso alone to the barber shop where the second witness signed in the absence of the testator.

[1, 2] The trial court chose to believe the evidence of the respondent and found: "The document offered and admitted to probate * * * was not subscribed by the testator in the presence of the attesting witnesses; the testator did not acknowledge in the presence of the attesting witnesses that said document was subscribed by him or by his authority; that the said testator did not declare to the attesting witnesses that said document was his will * * *." Since the evidence is conflicting we are bound by the finding.

[3] The rule is settled that under section 50 of the Probate Code a will must be signed (or acknowledged) by the testator in the presence of both witnesses present at the same time, and that each witness must sign at the request of the testator and in his presence. Sufficient authorities for a strict adherence to the code requirements are In re Estate of Krause, 18 Cal. 2d 623, 626, 117 P.2d 1 and In re Estate of Lynch, 70 Cal.App.2d 392, 161 P.2d 24.

The judgment is affirmed.

DOOLING, J., and SCHOTTKY, Justice pro tem., concur.

102 Cal.App.2d 612

PROPER v. PROPER.

Civ. 17716.

District Court of Appeal, Second District,
Division 1, California.
March 5, 1951.

Treva E. Proper brought action against Lee A. Proper for separate maintenance on ground of desertion. The Superior Court of Los Angeles County, Mildred L. Lillie and George Francis, JJ., rendered a judgment for the defendant and an order denying plaintiff's claim for temporary alimony, court costs and attorney's fees, and the plaintiff appealed. The District Court of Appeal, White, P. J., held that evidence sustained finding that defendant's residence in foreign state where he obtained a divorce, was bona fide, so that divorce decree obtained in foreign state was entitled to full faith and credit.

Judgment affirmed.

1. Appeal and error 🔑989

The power of an appellate court ends with respect to the facts when it determines that there is substantial evidence which supports the findings of the trial court.

2. Appeal and error 🔑1011(1)

Where circumstances relied on by appellant merely tended to create a conflict in the evidence in separate maintenance action on question whether appellee was a resident in foreign state when he procured divorce in foreign state, finding of trial court that appellee had a bona fide residence in foreign state could not be disturbed on appeal.

3. Divorce 🔑327

Evidence sustained finding that husband's residence in foreign state was bona fide so that divorce decree obtained in foreign state was entitled to full faith and credit in wife's subsequent action for separate maintenance.

4. Appeal and error 🔑984(1)

An order either granting or denying award of temporary alimony must be upheld on appeal in absence of a showing of an abuse of that discretion. Civ. Code, § 137.

5. Divorce 🔑182

Statute providing that court may in its discretion require husband to pay any money necessary to enable wife to prosecute or defend action for divorce applies to the making of an allowance to wife to cover costs of an appeal from a judgment denying her a divorce. Civ. Code, § 137.

6. Appeal and error 🔑1004(1)

Even if evidence adduced by wife in her action for separate maintenance would have been legally sufficient to sustain on appeal an order awarding her temporary alimony, District Court of Appeal had no authority to substitute its judgment for that of the trial judge who denied award of temporary alimony.

7. Appeal and error 🔑994(3), 1012(1)

The trial judge in a nonjury case is the sole arbiter of the weight of the testimony and the credibility of witnesses.

8. Appeal and error 🔑984(1)

Where District Court of Appeal was unable to find any legal grounds on which it might be held that rendition of order denying temporary alimony constituted an abuse of discretion, District Court of Appeal was not authorized to revise trial court's order denying temporary alimony.

9. Husband and wife 🔑295

Where there was substantial evidence in action for separate maintenance, to show the meager resources of the husband, and that wife had been receiving an allotment of about $100 a month for several years while husband was in the armed services, and that wife had received a substantial sum in war savings bonds, trial court did not abuse its discretion in denying wife temporary alimony.

◆

Harvey R. McKee, Robert P. Dockeray, Los Angeles, for appellant.

Walter H. Young, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff and appellant brought an action for separate maintenance upon the ground of desertion. Defendant answered that he had secured a divorce in Reno, Nevada, in November of 1947, and further set forth acts of cruelty by plaintiff by way of recrimination. After trial before the court it was adjudged that the Nevada divorce obtained by defendant was based on a "bona fide domicile" and is entitled to full faith and credit. Plaintiff has appealed from the judgment and from an order made subsequent thereto denying her application for support money, costs and attorney's fees pending the prosecution of her appeal from the judgment.

Appellant's main contention is that the finding of the trial court that respondent was a bona fide resident of Nevada at the time he instituted his divorce action is not supported by the evidence. It is urged that the evidence conclusively shows that he went to Nevada for the purpose of obtaining a divorce.

The parties were married in 1919. Respondent entered the army from Los Angeles in 1942. In May, 1947, he returned to the United States from Germany, and went directly to Reno, Nevada. In July, 1947, being still a member of the armed forces, he returned to Germany, having in the interim arranged for the filing and prosecution of the divorce action. In May, 1948, after obtaining his divorce in Nevada, he married a German woman and returned with her to the United States.

For the following reasons appellant contends that the judgment is against the evidence:

"1. Respondent and appellant were residents of and domiciled in the State of California, at the time respondent joined the Armed Forces.

"2. At the time respondent joined the Armed Forces he was a member, and had been for some time, of the Police Department of Los Angeles and at the time he joined the Armed Forces he did not resign his position and at no time thereafter did he resign his position.

"3. Respondent returned to the United States on May 1, 1947, and on May 3, 1947, he arrived in Reno, Nevada, not having been sent there by any direct order of the Armed Forces.

"4. Within a day or two after arriving in Reno he went to an attorney and directed the commencement of divorce proceedings against the appellant.

"5. He left Reno not later than the first week of July, 1947, and returned to Germany in the Armed Forces. He was not present in Reno at the time of the trial of his divorce action and had made arrangements with his Nevada attorneys to proceed with the action during his absence by having his deposition taken while he was still in Reno and also by having another deposition taken in Munich.

"6. On the basis of respondent's testimony, he was the father of a child born to Barbara Bader in Germany prior to the time that he returned to the United States and went to Nevada to secure his divorce. Shortly after his return to Germany and on May 4, 1948, he married Barbara Bader and with her and their child returned to the United States on May 30, 1948.

"7. On his way from the East Coast to Los Angeles he spent two or three days in Nevada and almost immediately upon his return to Los Angeles, resumed his duties with the Los Angeles Police Department, a position which he had never resigned."

[1] It is appellant's position that these facts and circumstances point to but one conclusion—that respondent never acquired nor intended to acquire a bona fide residence in Nevada, and that his unsupported statements of a different intention are not sufficient to overcome the effect of the facts and circumstances themselves. The record, however, contains other evidence supporting his declared intention which, in our view, brings into play the well-established rule that "The power of an appellate court ends with respect to the facts when it determines that there is substantial evidence which supports the trial court's findings." De Young v. De Young, 27 Cal.2d 521, 526 165 P.2d 457, 459, and cases there cited.

It appears from respondent's testimony that after entering the armed services in 1942 he went to Reno for several days and observed ski resort facilities and noted the possibilities of that type of business in that area. In 1943 he again went to Reno and considered the possibility of making it his home and establishing a sport center there. In 1943 he was transferred to Germany and was stationed at a famous ski resort area, where he and some brother officers conceived a plan to establish a ski resort in the Reno area when they should be released from the service.

In May 1947, respondent was returned to the United States on "terminal leave". The policy of the Army at that time was that a man who had served three years in the European Theater would not be reassigned thereto until he had spent six months in the United States. At the time respondent arrived in New York he was entitled to 120 days leave of absence, for which he applied, indicated to the Army that he was going to Reno, and actually went to Reno in pursuance of the plan to take preliminary steps towards establishing a ski resort. Upon his arrival in Reno he applied for release from military duty, and also applied for a reserve officer's training assignment to the University of Reno in the event he was not immediately released from the service.

After respondent had been in Reno for a few days, he consulted an attorney with a view to obtaining a divorce. During his stay, he visited the ski area almost every day, examined sites for ski resorts, consulted various people concerning the area, and had correspondence with his associates in Germany with reference to obtaining ski equipment. He testified that when he went to Reno, Nevada it was with the intention of making that area his permanent home.

On July 10, 1947, respondent had not been released from military service nor did he get his second choice of R. O. T. C. training in Nevada, but was reassigned to the European Theater. He thereupon made arrangements with his attorneys in Nevada to proceed with depositions and complete the divorce action. He returned to the United States in May, 1948, remained in New York for a week, and then went to Nevada for the purpose of settling there, but upon arriving at Reno found the situation had changed economically, and he and his associates concluded that they had missed their opportunity in the ski resort business and abandoned the project. Respondent thereupon came to Los Angeles and resumed his employment as a police officer.

From the time of respondent's induction into the army in 1942 until his return to Los Angeles in 1948, he was actually out of the State of California except for two short occasions when he was in California on military business. During this period he did not vote in California, apply for an absentee ballot, own any real estate in Los Angeles or have any business or commercial venture there. He was never stationed in Nevada by military orders, but went there of his own free will.

Respondent's intention to get a divorce from appellant was first formed in 1937. He testified to a long period of extreme cruelty towards him, consisting of intoxication, violence, profanity and association with other men.

[2, 3] The situation here presented is similar to the cases of Coleman v. Coleman, 92 Cal.App.2d 312, 206 P.2d 1093, and Windsor v. Windsor, 42 Cal.App.2d 464, 109 P.2d 363. As was said in the latter case, 42 Cal.App.2d at page 466, 109 P.2d at page 364 "The most that can be said is that under the evidence the trial court might have decided the disputed issue of fact either way and under such circumstances, an Appellate Court may not interfere after the trier of the facts has made its determination." The circumstances here relied upon by appellant merely tended to create a conflict in the evidence and this being so, the finding of the trial court cannot be disturbed. De Young v. De Young, supra, 27 Cal.2d at page 525, 165 P.2d at page 457; Baldwin v. Baldwin, 28 Cal.2d 406, 410, 170 P.2d 670; Cardinale v. Cardinale, 8 Cal.2d 762, 766, 68 P.2d 351; Collins v. Maude, 144 Cal. 289, 77 P. 945; Estate of James, 99 Cal. 374, 33 P. 1122.

With respect to appellant's second contention, that it was error to deny her temporary alimony, court costs and counsel fees for the prosecution of this appeal, reliance is placed upon Baldwin v. Baldwin, supra [28 Cal.2d 406, 170 P.2d 677]. In that case the wife appealed from a judgment upholding the validity of a Nevada divorce secured by the husband, and the husband appealed from an order awarding costs and attorney's fees to the wife incident to her appeal. The Supreme Court affirmed both the judgment and the order. The Court distinguished cases to the effect that before alimony or suit money can be awarded, the person seeking it must prove "existence of the marriage" with the other party to the proceeding, by saying: "In none of the three cases was an issue presented as to the validity of a divorce decree secured by one party following an admitted marriage to the other. Here the marriage relationship admittedly existed at the time of, and continued for several weeks following, the filing by plaintiff of her divorce complaint in this state, and the chief defense offered by defendant to plaintiff's requests for relief is that he thereafter secured in another state a decree of divorce from her. It is our view that under such circumstances, *and upon a proper showing otherwise,* plaintiff should not be denied the payment from defendant of funds to enable her to properly prosecute an appeal from the judgment determining the fact and effect of the Nevada decree. * * * It is now the law of this state that it is only after such an appeal has been finally determined (or the judgment of a California trial court adjudicating such issue has become final) that the validity or lack thereof of the Nevada decree and its effect—and consequently the marital, status and reciprocal obligations of the parties in this state—can be conclusively settled. * *" (Emphasis added.)

We do not believe that the cited case can be construed as holding that in the circumstances here presented the denial of the award sought is necessarily error. The Supreme Court was dealing with a case in which an award had been granted. It held that such an award should not be denied "upon a proper showing otherwise". Concluding its opinion, the Court said: "We are of the view that under all of the circumstances presented, it cannot be said that as a matter of law plaintiff failed to establish her need for the award or that the trial court was unwarranted in making it. * * *" The court then referred briefly to the financial condition of the parties and continued: "While the circumstances would well have supported a contrary determination we are of the view that those same circumstances do not necessarily require the conclusion that the trial court abused its discretion in making the disputed award."

[4] Thus it appears that the question remains one for the application of the sound legal discretion of the trial court, and that an order either granting or denying the award must be upheld in the absence of a showing of an abuse of that discretion. Civ. Code, sec. 137; Blank v. Blank, 139 Cal.App. 403, 18 P.2d 956. In the case last cited there was a sharp conflict in the evidence as to the financial worth of the respective parties. It was held that although the evidence might have been legally sufficient to support an award, nevertheless the trial court acted within its legal discretion in denying it, and in the absence of an abuse of discretion, the appellate court was without authority to disturb the order.

[5-9] Section 137 of the Civil Code specifically provides that the court may "in its discretion" require the husband to pay any money necessary to enable the wife to prosecute or defend the action. And this applies to the making of an allowance to the wife to cover the costs of an appeal from a judgment denying her a divorce. Stewart v. Stewart, 156 Cal. 651, 105 P. 955; Newlands v. Superior Court, 171 Cal. 741, 154 P. 829. Even though it be conceded in the present action that if the trial court had seen fit to grant this motion, the evidence adduced in her behalf would have been legally sufficient to sustain such order on appeal, such a situation confers upon us no authority to substitute our judgment for that of the judge, who, under well settled rules, is the sole arbiter of the weight of the testimony and the credibility of witnesses. Unable as we are to find any legal ground upon which it may be held that the rendition of the order adverse to appellant constituted an abuse of discre-

tion, we are not authorized to revise the lower court's order. In the present case, the judge who denied the award had before her the entire transcript of the trial of the cause as well as the affidavit and counter-affidavit presented on the hearing of the application for the award. There was substantial evidence to show the meager resources of the respondent, that appellant had been receiving an allotment from him of approximately $100 per month until his separation from the service in June, 1948; and that appellant had received a substantial sum in war savings bonds.

For the reasons stated, the judgment and order appealed from are, and each is, affirmed.

DORAN and DRAPEAU, JJ., concur.

102 Cal.App.2d 672

In re MOORE'S ESTATE.

SCOTT v. MOORE.

Civ. 18132.

District Court of Appeal, Second District, Division 3, California.

March 6, 1951.

Action by Garnette L. Scott against Clarence R. Moore to procure probate of a document all in handwriting of deceased, as will of Mary Ellen Moore. The Superior Court of Los Angeles County, John Gee Clark, J., admitted document to probate and revoked letters of administration previously issued to Clarence R. Moore, and he appealed. The District Court of Appeal, Bartlett, J. pro tem., held that there was no animus testandi expressed by the document.

Judgment admitting instrument to probate and revoking letters of administration previously issued, reversed.

1. Wills ⊂⇒72, 206

An instrument, to be entitled to probate as a will, must show intent to make testamentary disposition of property by that very instrument.

2. Wills ⊂⇒72

Where decedent left document reciting manner in which she desired to leave her property and stating that she would leave a will, document lacked testamentary intent necessary for probate as will.

3. Wills ⊂⇒72

Where decedent left instrument reciting manner in which she desired to dispose of her property but which failed to show testamentary intent, and also left document which had testamentary intent but was otherwise ineffectual as will, the absence of testamentary intent was not supplied by similar recitals in the two documents as to desired disposition of property.

◆

F. Murray Keslar and Crider, Runkle & Tilson, all of Los Angeles, for appellant.

Vincent Scott, Los Angeles, for respondent.

BARTLETT, Justice pro tem.

Mary Ellen Moore committed suicide on July 10, 1948. She left surviving her Clarence R. Moore, her husband, the appellant herein, her mother, Garnette L. Scott, the respondent herein, and a son, Michael John Moore, who was five years of age. On a desk near the scene of her death was found a sheet of paper in the handwriting of the deceased upon which was written: "Everything that is mine, both personal and real, I leave to my mother, Garnette. Money in Bank of America from my father's estate and all other things left to me. (Signed) Mary Ellen Moore." This undated document was presented to the court on August 24, 1948, denied probate, and appellant was appointed administrator of the estate. No appeal was taken from this order.

Some three weeks later the respondent found in the pocket of one of her coats hanging in a closet one of decedent's rings around which was wrapped a piece of tissue paper upon which was written entirely in the handwriting of the deceased these words: "July 4, 1948 Mother Here is my ring. I leave you this and all that is mine. Mike is provided for. Dont grieve for me. I love you. I'll leave a Will. (Signed) Mary Ellen." On July 4, 1948, Mary Ellen Moore was of sound mind. It was this note which was admitted to probate as the Last Will and Testament of the deceased.

[1] The only question raised on this appeal is whether or not the decedent intended this instrument to be her Will. Other than what may be inferred from the facts we have related, no extrinsic evidence was offered by either party bearing on the intent of the deceased in writing this letter to her mother. To be a Will, the instrument offered for probate must have been executed with testamentary intent and it must be shown that by that very paper itself she intended to make a disposition of her property. In re Estate of Wunderle, 30 Cal.2d 274, 280, 281, 181 P.2d 874; In re Estate of Button, 209 Cal. 325, 331, 287 P. 964; In re Estate of Miller, 128 Cal.App. 176, 183, 17 P.2d 181; In re Estate of Kelleher, 202 Cal. 124, 129, 259 P. 437, 54 A.L.R. 913.

[2] In re Estate of Pagel, 52 Cal.App.2d 38, 125 P.2d 853, 854, the decedent, then an inmate of Cedars of Lebanon Hospital, on November 21, 1939, handed the manager of the hospital a sealed envelope with the remark that he was leaving everything to the hospital and asked the manager to write on it: "To be opened after my death by Cedars of Lebanon Hospital." Five days later Pagel died. The envelope was opened and found to contain a document entirely written, dated and signed by the decedent addressed to the hospital in which he set forth all of his property in detail and stated among other things: "when I accepted the benevolence of the Ced. of Lebanon Hospital it was for me a matter of course that my property and estate should only to to the Cedars of Lebanon Hospital after my death." He then stated that he hoped within the next few days to induce the hospital to put its attorney at his disposal to make such a Last Will and Testament. This document was dated October 17, 1939. The case holds that this document could not be admitted to probate. In the proceeding before us the decedent said: "I'll leave a Will". The following language of the court in the case just cited is therefore pertinent, 52 Cal.App.2d at page 44, 125 P.2d at page 856: "We say this because the decedent made it perfectly clear by the language used in his letter that he did not intend the letter to act as a posthumous declaration, but on the contrary stated he desired that his posthumous disposition narrated in his letter should be declared in a last will and testament. In brief, when he wrote the letter it is perfectly obvious from its language that he did not regard it in and of itself as a posthumous disposition. As it is clear that it was not written with an *animus testandi*, it did not and could not achieve that status by any subsequent act on his part short of a writing to that effect." In Re Estate of Kisling, 68 Cal.App.2d 163, 156 P.2d 57, the decedent wrote a letter to her lawyer stating that she was ill and asking him to make a Will and then wrote out specifically what she wanted done with her property. This instrument was refused admission to probate and the court stated 68 Cal.App.2d at page 167, 156 P.2d at page 59: "And, where on its face the instrument is free from ambiguity, it may not be shown that the maker thereof intended it to operate differently than what the language used indicates."

[3] Respondent argues that the intent clearly expressed in the undated document found near the body of decedent "fortifies and corroborates" the intent expressed in the document offered for probate. It does fortify and corroborate the manner in which the decedent desired to leave her property but does not show that she intended to have that very paper itself operate as a Will. In Re Estate of Major, 89 Cal.App. 238, 264 P. 542, the decedent wrote a letter to his nephew stating: "* * * i will go to St. Andre before long and i take up with me the copy of my testament you ask me for but be sure i have not change my idea your are to be the owner of the hold thing i am worting about $15,000 to $16,000 dollar * * *." In considering the question as to whether or not this document should be admitted to probate the court stated 89 Cal.App. at page 241, 264 P. at page 543: "Proof that a party intend-

ed to make a disposition of his property similar to or identical with that contained in a certain paper which he has executed, does not make such paper his will. No matter what his intentions may have been with respect to the disposition of his estate, if the maker of an instrument did not intend *by that particular paper* to dispose of his property in the manner in which it could have been disposed by a will, such instrument must be denied probate, no matter how correct it may be as to form and execution, and no matter how clearly it may conform to the intentions of the maker which he had otherwise expressed. 1 Alexander on Wills, §§ 46, 47."

The language of the decedent "I'll leave a Will" was clear and unambiguous. It negatives any idea that she considered the letter to her mother to be a Will. On the contrary it shows that some other writing yet to be made would be her Will. The fact that the undated paper was written in an attempt to make a Will is corroborative of this construction.

The judgment admitting the instrument to probate and revoking the letters of administration theretofore issued to Clarence R. Moore is reversed. The administrator of the Estate of Mary Ellen Moore is directed to pay the costs of this appeal from the assets of the estate.

SHINN, P. J., and VALLÉE, J., concur.

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102 Cal.App.2d 653

PEOPLE v. PART et al.

Civ. 17282.

District Court of Appeal, Second District,
Division 1, California.
March 6, 1951.

Action by the People of the State of California against Max Part and another, copartners doing business as Cash Wholesale Tobacco Co., a co-partnership. From a judgment of the Superior Court of Los Angeles County, Clarence M. Hanson, J., sustaining a demurrer to the complaint and dismissing the action the People appealed. The District Court of Appeal, White, P. J., held that the state was a proper party plaintiff to maintain a civil action to restrain alleged violations of the Unfair Practices Act.

Judgment reversed.

Doran, J., dissented.

Trade-marks and trade-names and unfair competition 🔑91

In view of the declared purpose of the Unfair Practices Act to safeguard the public, the state through the attorney general was a proper party plaintiff to maintain a civil action to restrain alleged violation of the Act. Business and Professions Code, §§ 17000–17101.

Fred N. Howser, Atty. Gen., James A. Doherty, Deputy Atty. Gen., for appellant.

Knight, Gitelson & Ashton, and Nat Rosin, all of Los Angeles, for respondents.

WHITE, Presiding Justice.

This is an appeal taken by the People of the State of California from a judgment of the Superior Court of Los Angeles County sustaining a demurrer to the people's complaint without leave to amend and dismissing the action.

The action was one instituted by the attorney general in behalf of the People of the State of California to enforce the "sales below cost" provisions of the Unfair Practices Act, Business and Professions Code, §§ 17000–17101.

In a memorandum ruling prepared by the trial judge it was held that the state was not a proper party plaintiff to maintain a civil action to restrain alleged violations of the Unfair Practices Act. Judgment was entered accordingly.

This precise question was before the Supreme Court in the case of People v. Centr-O-Mart, 34 Cal.2d 702, 214 P.2d 378, 380, sometime after the decision by the trial court in the instant action. In fairness to the trial judge it should be stated that the particular question here involved had not theretofore been decided by the Supreme Court.

After holding that the legislature has specifically declared that the purpose of the act here in question is to "safeguard the public", the court, in the case just cited, concluded, "that there is nothing in the Unfair Practices Act to lead to the conclusion that the Legislature intended to exclude the State, acting through its duly elected officers, from enforceing its provisions in the interest of the public welfare".

Upon the authority of the case of People v. Centr-O-Mart, supra, and for the reasons therein stated, the judgment from which this appeal was taken is reversed.

DRAPEAU, J., concurs.

DORAN, J., dissents.

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102 Cal.App.2d 626

PEOPLE v. STINCHCOMB.

Cr. 4323.

District Court of Appeal, Second District,
Division 1, California.
March 5, 1951.

Gilbert Joseph Stinchcomb was convicted of certain offenses and filed a petition for a writ in the nature of a writ of error coram nobis. The District Court of Appeal affirmed an order denying the petition, 92 Cal.App.2d 741, 208 P.2d 396, and thereafter defendant applied for a rehearing on the appeal and for review of the order denying the writ. The District Court of Appeal, in an opinion by the court, held that there was nothing in the record which would warrant the granting of an order in the nature of a writ of error coram nobis.

Petition denied.

1. Criminal law 🔑1133

Where defendant's petition for rehearing in the District Court of Appeal was filed too late, but defendant claimed that certain officers of state penitentiary in which he was confined had resorted to legal obstruction to deny right to submit legal action to the courts within required period, Court of Appeals would consider petition for rehearing rather than dismiss it as too late. Rules on Appeal, rule 27(b).

2. Criminal law 🔑1133

On application for rehearing of appeal and review of order denying writ of error coram nobis, record disclosed nothing to warrant granting order in nature of writ of error coram nobis setting aside the judgments.

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Gilbert J. Stinchcomb, in pro. per.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., for respondent.

PER CURIAM.

Appellant has filed in this court several documents which he designates as "Notice and Application for Rehearing of Appeal and an Order Denying Error Coram Nobis and Certificate of Probable Cause for Allowance of Rehearing of Appeal."

Reviewing the foregoing papers, we construe them all to be in effect a petition for rehearing in the case of People v. Stinchcomb, 92 Cal.App.2d 741, 208 P.2d 396, decided by this court, wherein the appeal by appellant Stinchcomb from an order "denying petition for writ in nature of a writ of error *coram nobis*" resulted in an affirmance of an order of the Superior Court of Los Angeles County denying appellant's petition. On August 4, 1949, appellant's petition for a hearing was denied by the Supreme Court.

Manifestly, appellant's petition for rehearing comes too late. Rule 27(b) of Rules on Appeal provides that a party seeking a rehearing in a criminal case in the District Court of Appeal must serve and file a petition therefor within eight days after the filing of the decision. In the instant case the decision was filed July 8, 1949. However, although appellant regularly and duly filed his petition for a hearing in the Supreme Court, he now asserts in the foregoing petition for rehearing filed with this court that certain officers of the State Penitentiary at Represa, California, where he is now confined (not the Warden) resorted to "legal obstruction of conniving to deny petitioner the rights to submit legal actions to the courts within the period of time required and prescribed by law. * * *"

[1] Unless we can find some theory upon which to relieve appellant from the time element in this case, Rule 27(b), Rules on Appeal, his petition for rehearing should be dismissed. However, upon the theory advanced in People v. Slobodion, 30 Cal.2d 362, 364, 365, 366, 181 P.2d 868, we will not dismiss the petition for rehearing.

[2] This, then, brings us to a review of the petition as if it had been filed within the required time. Such a review leads us to the conclusion, as stated by us in People v. Stinchcomb, supra, 92 Cal.App.2d at page 747, 208 P.2d at page 400, that "There is nothing in the record which would warrant the granting of an order in the nature of a writ of *coram nobis* setting aside the judgments."

It therefore follows that the petition for rehearing should be denied. It is so ordered.

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102 Cal.App.2d 643

PEOPLE v. CAYER.

PEOPLE v. SUNDERLAND.

Cr. 2224, 2225.

District Court of Appeal, Third District, California.

March 5, 1951.

Hearing Denied April 3, 1951.

Joseph P. Cayer and Lloyd Sunderland were convicted of murder of the second degree and they took separate appeals from the judgment and from the order denying the new trial rendered in the Superior Court, Plumas County, J. O. Moncur, J. The District Court of Appeal, Adams, P. J., held that the two cases would be considered together since the charges grew out of the same episode and the defendants were tried together and their appeals were on the same trial transcript and that evidence sustained the conviction of each of the defendants.

Judgments and orders denying new trials affirmed as to both defendants.

1. Criminal law 🔑1144(13)

On appeal from a conviction, District Court of Appeal is governed by rule that evidence must be reviewed in light most favorable to prosecution.

2. Homicide 🔑22(1), 23(1)

Malice aforethought is an essential element of crime of murder whether it be of first degree or of second degree. Pen. Code, §§ 187, 188.

3. Homicide 🔑23(1)

Use of a weapon of some kind is not a prerequisite to second degree murder. Pen.Code §§ 188, 192.

4. Homicide 🔑254

Evidence of malice was sufficient to sustain conviction of defendant who administered beating to victim on charge of murder in second degree rather than manslaughter. Pen.Code, §§ 188, 192.

5. Homicide 🔑231

In murder prosecution, evidence sustained finding that one defendant not only aided and abetted other defendant who administered alleged beating to victim but that he did so with malice.

6. Criminal law 🔑636(3)

Where motion to amend information by changing charge from manslaughter to murder was heard in presence of counsel for both defendants, who made no objection except that evidence presented at preliminary hearing did not bear out allegation of malice, and nothing was said by counsel about absence of defendants when motion was made and granted, and one of the defendants pleaded to amended information without objection, defendants' counsel being present when amendment was made, defendants' presence was waived. Pen.Code, §§ 995, 1008.

7. Criminal law 🔑1037(1), 1119(4)

In murder prosecution, where defendant contended that district attorney was guilty of prejudicial misconduct in his final argument to jury but arguments were not brought up on appeal and defendant in his opening brief admitted that no objection was made to what he designated as "this prejudicial excursion outside the record", contention would not be considered, and furthermore point was lost by failure to demand that argument be included in record. Rules on Appeal, rule 4(a).

8. Criminal law ⚷825(2)
Homicide ⚷309(1)

Where instruction regarding involuntary manslaughter given in murder prosecution was that information defendants could, if evidence warranted it, be convicted of manslaughter, which was defined by statute to be unlawful killing of a human being without malice and was of two kinds, first, voluntary, on a sudden quarrel or heat of passion, and second, involuntary, in commission of an unlawful act which might produce death, in an unlawful manner or without due caution or circumspection, instruction followed statute and if defendant desired fuller definition he should have presented a request therefor. Pen.Code, § 192.

9. Criminal law ⚷770(2), 824(1)

It is duty of court in criminal cases to give, of its own motion, instructions on general principles of law pertinent to such cases, where they are not proposed or presented in writing by parties themselves, but it is not its duty to give instructions on specific points developed through evidence introduced at trial, unless such instructions are requested by party desiring them.

10. Criminal law ⚷824(1)

Where court fully and fairly charges jury on law appertaining to facts of case, its failure to instruct on any particular matter deemed essential is not error in absence of a request for such an instruction.

11. Criminal law ⚷814(16)

In murder prosecution, where there were no admissions of one defendant that implicated the other defendant, no instruction to jury that it was not to consider admissions of one defendant in weighing evidence against other defendant was required.

◆

Appellants in pro. per. and Frederic H. Vercoe, Los Angeles, Nathaniel S. Colley, Sacramento, for appellants.

The Attorney General and Doris H. Maier, Deputy Attorney General, for respondent.

ADAMS, Presiding Justice.

These two cases will be considered together since the charges grew out of the same episode, appellants were tried together and their appeals are here on the same trial transcript.

Each appellant was charged in a separate amended information with the crime of murdering one William James Bailey on August 20, 1949. A jury convicted them of murder of the second degree and judgments were entered accordingly. Their motions for new trials were denied and they have taken separate appeals from the judgments and from the orders denying the new trials.

The following facts find support in the record. Colonel McCrillis and his daughter Jane operated the Belden Resort in Plumas County. The resort maintained a barroom, dance hall and cardroom. Cayer was there employed as a bartender, Sunderland as manager of the bar, and the deceased as card dealer. According to the testimony of Jane McCrillis she arranged to relieve Cayer as bartender between 6:00 and 6:30 o'clock in the afternoon of August 20th because he was not sober enough to be on duty behind the bar. Sunderland resented Miss McCrillis' action because she went over his head as manager of the bar, and he resigned.

The Case against Cayer

[1] We are governed by the rule that the evidence must be reviewed in the light most favorable to the prosecution. People v. Dukes, 90 Cal.App. 657, 659, 266 P. 588, cited in People v. Milo, 89 Cal.App.2d 705, 707, 201 P.2d 556.

Cayer became obsessed with the idea that Bailey had reported him drunk to Miss

McCrillis, and when Bailey entered the barroom from the cardroom between 7:30 and 7:40 in the evening, Cayer accused him of reporting him to Miss McCrillis and charged him with being a stool pigeon. Deceased replied, "No, you're wrong." Thereupon Cayer struck deceased with his fist. Miss McCrillis testified that deceased had not reported anything to her and that he had nothing to do with relieving Cayer as bartender. Cayer was a young man and had not been out of the Navy very long, while Bailey was about 58 years old. The following will show that Cayer gave the deceased a terrific beating.

John P. Marchello testified that he saw Cayer strike the decedent, and as the latter went down Sunderland picked him up and Cayer struck him again; that each time the deceased got up Cayer knocked him down again, and the third time deceased did not get up; that after deceased was down Cayer kicked him in the head, the side of the face and in the ribs; that deceased was covered with blood from head to foot and that there was blood on the floor and walls.

Mildred Marchello testified that she saw Cayer hit the deceased and knock him down and then kick him while he was down; that a Mrs. McMahon went to the aid of the deceased, the fighting stopped and deceased was taken out; that while decedent was on the floor absolutely helpless, Cayer said to him, "Why don't you get up and fight, you son-of-a-bitch?" and deceased replied, "I can't, I can't"; that the deceased was a mass of blood and one couldn't tell who he was; that his shirt was torn and his face was just beat up to a mass of blood; that after deceased was taken out, Cayer and Sunderland came into the cardroom and Cayer said to Mr. Marchello: "Jimmie's [meaning the deceased] a friend of yours, and you tell the son-of-a-bitch the next time you see him we'll kill him."

Fred McMahon testified that when he saw Cayer strike the deceased he rushed up and grabbed Cayer around the neck and started to pull him off; that Sunderland grabbed him and shoved him away; that Cayer was on top and astride of the deceased and hitting him in the face and chest; that deceased was only trying to avoid punishment, and was not fighting; that deceased was bleeding, his clothing was terribly bloody, his nose was cut deep and he was bleeding from it and from his mouth; that the witness, his wife and Marchello helped the deceased out of the place; that he was pretty weak and had to be helped; that after the fight ended, Sunderland, in the presence of Cayer, said: "We'd beat him [deceased] every day until he left this canyon"; that both Cayer and Sunderland had been drinking; that while deceased was down Cayer ripped off decedent's shirt and rubbed it all over decedent's face, rubbing as hard as he could rub it in; that Cayer was astride decedent at that time.

Nestor A. Takala testified he arrived at the barroom and saw Cayer strike deceased three or four blows; that deceased went down in a prostrate condition on the floor and Cayer got astride him and continued hitting him; that the witness appealed to Sunderland to stop the fight and Sunderland told him to get away, it didn't concern him; that witness looked around for an acquaintance to help him stop the fight but saw none; that Cayer still had the deceased on the floor, was astride him and showering blows on deceased's body and face while decedent was merely trying to defend himself; that he was on the floor on his back and in no position to fight back; that decedent was covered with blood and his shirt had been stripped off of him during the struggle.

George A. Wess testified that when he arrived deceased was lying on the floor and Cayer seemed to be kicking him in the side; that when deceased got partly up Cayer beat him down again and said: "I'd like to get another kick at him."

May McMahon testified that when she arrived deceased was on the floor and Cayer on top of him beating him in the face; that she guessed she started to scream and told them to stop the fight and they pulled Cayer and the latter pulled deceased to a sitting position and deceased kept saying: "You're wrong boys, you're wrong"; that this witness, with the aid of others, took the deceased to her apartment; that he was all blood, and she got towels and started washing him and trying to stop the blood that was so bad on his nose, and that she noticed blood coming out of his ears; that a man came in and she asked him to get a car quick to take the deceased to a doctor, and that deceased was taken to the Plumas Industrial Hospital at Quincy.

Emmie Hahn, a registered nurse at the hospital, testified that when deceased was brought in he had a cut on the left side of his lip, his left eye was blue above the lid, his nose was injured and nostrils crusted with blood; that he complained of pain in his face and in the region of his heart; that while she was cleaning him he had a "seizure," and was blue on the neck and face; that she called Dr. Carr who used a stethoscope and they tried to resuscitate decedent but he passed away.

Dr. Donald Bleiberg, the owner and operator of the hospital, testified as to cause of decedent's death: "Well, my opinion as to the cause of death was that he suffered heart failure due to blood clots within the coronary vessels, which in turn was due to the trauma and shock received due to this beating." The doctor further testified that decedent had a cut lip, a bruised swollen place on the left side of his forehead, a bruised, swollen area on the left side of his chest, and that his nose was swollen and blood was coming from it.

Jesse L. Carr, an eminent pathologist of San Francisco, testified that he did not think this man had a spontaneous heart attack; that the disease as described by the autopsy surgeon was not sufficient for him to have died from a heart disease; and that except for the beating decedent would be alive.

Appellant Cayer argues that the most the evidence shows is involuntary manslaughter. He claims he could not legally be held for second degree murder because the attack on the decedent amounted to only an assault and battery, which is a misdemeanor and not a felony. Citing section 192 of the Penal Code, Cayer suggests that this court reduce the judgment to manslaughter. In this Cayer's argument would be controlling were it not for the fact that under section 192 the offense could not be manslaughter if there was "malice." Section 188 of the Penal Code provides that such malice (malice aforethought) may be express or implied; that it is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

[2] In People v. Bender, 27 Cal.2d 164, 180, 163 P.2d 8, 17, the court said:

"'Murder,' says the Penal Code (§ 187), 'is the unlawful killing of a human being, with malice aforethought.'

"Thus 'malice aforethought' is made an essential element of the crime of murder whether it be of the first degree or of the *second* degree. 'Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.' (Pen. Code, § 188.)

"'The words "malice" and "maliciously" import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law' (Pen.Code, § 7, subd. 4) but they do not, at least insofar as implied malice is concerned, require a preexisting hatred or enmity toward the individual injured."

Cayer relies mainly upon People v. Munn, 65 Cal. 211, 213, 3 P. 650, 651, in which Munn's conviction of murder of the second degree for the death of the victim following a fist fight was reversed. But the court there said: "If the means employed be not dangerous to life, or, in other words, if the blows causing death are inflicted with the fist, *and there are no aggravating circumstances,* the law will not raise the implication of malice aforethought, which must exist to make the crime murder. *The distinguishing characteristic respecting the two crimes of murder and manslaughter is malice.* Without the presence of this element of malice the crime does not reach the higher degree of murder, but amounts simply to manslaughter." (Italics added.)

Cayer also cites People v. Murat, 45 Cal. 281; People v. Denomme, 6 Cal.Unrep. 227, 56 P. 98; People v. Mullen, 7 Cal.App. 547, 94 P. 867; People v. Miller, 114 Cal. App. 293, 299 P. 742, and People v. Slater, 60 Cal.App.2d 358, 140 P.2d 846. But in the Murat case the verdict was guilty of an assault with a deadly weapon when no weapon was shown to have been used. In the Denomme case the defendant was found guilty of manslaughter only. In the Mullen case the charge was manslaughter; malice did not enter into the case. In the Miller case defendant was convicted of manslaughter only, and malice did not enter into it. In the Slater case the existence of or lack of malice was apparently not considered; also there was a vigorous dissent from the reduction of the degree of the crime to manslaughter.

The case before us is comparable to People v. Tubby, 34 Cal.2d 72, 207 P.2d 51. There the degree of the offense was reduced to second degree murder, though the circumstances were more favorable to defendant than in the case before us.

[3] Cayer seems to contend that a weapon of some kind is prerequisite to second degree murder, but the Tubby case dispels such theory.

[4] People v. Efstathiou, 47 Cal.App. 2d 441, 118 P.2d 22, decided by this court, is almost identical on the facts. The victim was the proprietor of a restaurant in Vallejo and defendant was employed as a cook. The proprietor and the cook got into an argument over the manner in which a steak was prepared and defendant was "fired." The proprietor left the restaurant and defendant ran after him. They met on the street and a fight ensued. There were no witnesses to the beginning of the encounter. Defendant testified that they exchanged blows with their fists and that he hit the victim and knocked him down. A witness testified that he saw appellant start to cross the street, then turn back to where the proprietor was lying and kick him. The victim died as a result of his injuries. A judgment of murder in the second degree was affirmed. Also see People v. Alexander, 62 Cal.App. 306, 308, 216 P. 968, hearing in Supreme Court denied.

That Cayer acted with malice is evidenced by his own testimony that he thought deceased had told Miss McCrillis that he was drunk behind the bar, and that when he saw him he "just went over and hit him." The statements made to the Marchellos, set forth above, are also evidence of malice.

The Case against Sunderland

Sunderland's first point urged for reversal is that there is no evidence of malice on his part. However, the record shows that several persons attempted to stop the fight but Sunderland prevented them. John P. Marchello testified that while Cayer was beating the deceased, Sunderland stood over them and said: "If any of you sons-of-bitches want the same thing, just come and step in."

Mildred Marchello testified that when she came in "Lloyd [Sunderland] was holding Jim [deceased] and Joe [Cayer] hit him"; that people spoke of stopping it but nobody stepped forward "because Lloyd [Sunderland] was standing there and he says, 'Any of the rest of you sons-of-bitches want any of this why step right up and get it.' "

Fred McMahon testified that both Cayer and Sunderland struck the deceased about the same time, when he first entered the room; that "I reached up and grabbed Joe [Cayer] around the neck and started to pull him off, and Lloyd [Sunderland] said, 'Lay off, if you don't want to get hurt,' and grabbed me and shoved me towards the door"; that he thought of getting the constable but remembered that the constable had gone to the fair at Quincy, so he came back in; and that Sunderland stood right there and kept pushing the crowd back, and said, "Don't anybody step in if you don't want to get hurt"; that he heard Sunderland say they would beat him (the deceased) every day until he left the canyon; that he saw Sunderland kick at Bailey's shoulders or head but did not know if he connected.

Nestor A. Takala testified: "The first thing that caught my eye was the defendant Lloyd Sunderland. He seemed to be holding, holding the people back; holding the crowd back. * * * I had somewhat analyzed the situation and I then appealed to the other defendant Lloyd Sunderland, who I recognized as the manager of the Belden Resort bar. I appealed to him and said with these words: I said, 'Let's stop this fight.' Sunderland's answer to me was, with a shove at the same time, he said, 'Get away! This doesn't concern you.' I tried to reason with Sunderland. I says, 'But he's killing him.' Sunderland's answer to me was, 'Let him kill the son-of-a-bitch.' "

George A. Wess testified that Sunderland defied anybody to interfere and said, "Well, anybody else want the same thing?" May McMahon testified that Sunderland stood over the deceased and said: "I'll be in the county for ninety days. I'll beat you every day for ninety days until you're gone or I'm gone." Violet Kehlor testified that after the fight Sunderland asked her if she had heard what "they'd done to Jim Bailey"; she told him no. He said, "We kicked the shit out of the brown-nosed son-of-a-bitch." Ernest Wussow, *a defense witness*, testified that when he came in Sunderland said that if anyone else wanted to get in or butt in he would get some of the same—or something like that.

Jane McCrillis testified: "Yes, I heard Lloyd [Sunderland] say the same thing that Mrs. McMahon testified; that he would be in the county for ninety days and that he would beat Jimmie [decedent] every day of the ninety days, and I also said to, told Lloyd—I told him to get out and he said to 'make me.' "

Sunderland's conduct made him a principal. In People v. Le Grant, 76 Cal.App.2d 148, 154, 172 P.2d 554, 557, in which the defendants were found guilty of manslaughter, the court said, regarding an asserted principal: "Indeed, by his own statements, he gave active aid, encouragement and assistance to Vincent by taking such an affirmative part as to keep other people back who might have 'butted in' and have thus prevented the tragedy. By so doing he acted with full knowledge that an assault and battery was in progress, the reasonable and natural consequence of which might be a serious injury to, or possibly the death of, either or both of the combatants. Such a course of conduct on the part of Le Grant constituted an aiding and abetting of Vincent in the unlawful assault and battery and resulting homicide, thus making him also liable as a principal for the crime of involuntary manslaughter. [Numerous cases cited.]"

[5] From the evidence in this case we are satisfied that Sunderland not only aided and abetted Cayer, but that he did so with malice.

[6] His second contention is that the court erred in permitting an amendment of the information in his absence by changing the charge from manslaughter to murder. The motion to amend was heard in the presence of counsel for both Cayer and Sunderland who made no objection except "that the evidence presented at the preliminary hearing does not bear out the allegation of malice." Nothing was said by counsel about the absence of the defendants when the motion was made and granted; and Sunderland pleaded to the amended information without objection. Section 1008 of the Penal Code provides for amending the information. Section 995 provides grounds for setting aside the information, and absence of a defendant is not a ground. Defendants' counsel was present when the amendment was made, and waived the presence of defendants.

Appellant cites no statute or case which provides that an amendment may be made only while a defendant is present. In fact, People v. Garcia, 2 Cal.2d 673, 680, 42 P.2d 1013, cited by Sunderland, contains language refuting his present claim.

[7] The third point raised by Sunderland is that the district attorney was guilty of prejudicial misconduct in his final argument to the jury. The arguments have not been brought up. However, Sunderland in his opening brief admits that no objection was made to what he designates as "this prejudicial excursion outside the record." Furthermore, his point is lost by failure to demand that the argument be included in the record. Rule 4(a) of Rules on Appeal.

[8] The fourth point made is that the court erred in failing to instruct the jury correctly and adequately. It is not claimed that Sunderland offered any instructions that were refused. The alleged error is that the court's instruction regarding involuntary manslaughter was erroneous. The instruction given was:

"Under the Information in this case, the defendants may, if the evidence warrant it, be convicted of manslaughter. This is defined by our statute to be the unlawful killing of a human being without malice, and is of two kinds:

"First, voluntary, upon a sudden quarrel or heat of passion; and second, involuntary, in the commission of an unlawful act which might produce death, in an unlawful manner or without due caution or circumspection."

This follows Penal Code section 192. If appellant desired a fuller definition he should have presented a request therefor.

[9, 10] As is stated in People v. Bender, supra, 27 Cal.2d at page 175, 163 P.2d at page 15: "The general rule relating to the duty of the court in giving instructions in criminal cases is stated in People v. Warren (1940), 16 Cal.2d 103, 116, 117, 104 P.2d 1024, 1031: '"It is the duty of a court in criminal cases to give, of its own motion, instructions on the general principles of law pertinent to such cases, where they are not proposed or presented in writing by the parties themselves. But it is not its duty to give instructions upon specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them. When the court fully and fairly charges the jury upon the law appertaining to the facts of the case, its failure to instruct on any particular matter deemed essential is not error in the absence of a request for such an instruction." 8 Cal.Jur. 309, and cases cited.'"

[11] Sunderland's next alleged error is that while the jury was instructed to disregard testimony held to be inadmissible, it was not cautioned not to consider the admissions of Cayer in weighing the evidence against Sunderland. We find no admissions of Cayer that implicated Sunderland, so, as far as he is concerned, no such instruction was needed. At one point in the trial objection was made that a statement of Sunderland in the absence of Cayer should not be considered as against Cayer, and the jury was so instructed.

We find no reversible error in the record. Accordingly, the judgments and the orders denying new trials are affirmed as to both appellants.

VAN DYKE and PEEK, JJ., concur.

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102 Cal.App.2d 750

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. HENNELLY.

Civ. 4088.

District Court of Appeal, Fourth District, California.

March 8, 1951.

Rehearing Denied March 28, 1951.

Hearing Denied May 3, 1951.

The Bank of America National Trust and Savings Association (a corporation) as executor of the estate of Rose A. Leverone, deceased, brought action against Ida Hennelly to quiet title to realty. The Superior Court of Fresno County, Arthur C. Shepard, J., rendered a judgment for the defendant, and the plaintiff appealed. The District Court of Appeal, Griffin, Acting P. J., held that general rule that under doctrine of res judicata a will cannot be looked to for purposes of impeaching or contradicting the plain and unambiguous terms of a final decree of distribution of testator's estate was not applicable.

Judgment affirmed.

See also Cal.App., 228 P.2d 79.

1. Executors and administrators 🔑315(6)

Generally, under the doctrine of res judicata, a will cannot be looked to for purpose of impeaching or contradicting the plain and unambiguous terms of decree of distribution of estate of testator, where that decree has become final.

2. Executors and administrators 🔑315(6)

Where testator by will gave his widow for life net income arising from his estate, and provided that on death of widow one half of estate should go to A, one fourth to B, and one fourth to C, and after death of testator widow and A, B and C went to office of attorney where widow executed deeds conveying fee title to A, B and C, and they executed a quitclaim deed to widow providing that on death of widow, realty should revert to A, B, and C, and decree of distribution of estate of testator provided that residue of estate should be distributed under the will and under deeds to widow, general rule that under doctrine of res judicata will cannot be looked to for impeaching or contradicting plain and unambiguous terms of final decree of distribution, was not applicable, and on death of widow, A, B and C, were entitled to the realty. Probate Code, §§ 1020, 1021.

3. Wills 🔑634(20)

Where testator by will gave his widow for life net income arising from his estate, and provided that on death of widow one half of estate should go to A, one fourth to B, and one fourth to C, estate of testator vested in legatees under will at time of his death, and there was ample title in A, B and C after testator's death to support reversionary clause in quitclaim deed by them of realty of testator to widow with provision that on death of widow, realty should revert to A, B and C.

◆

John D. Chinello, Fresno, for appellant.

Ralph E. Wallace, Fresno, for respondent.

GRIFFIN, Acting Presiding Justice.

Rose A. Leverone, deceased, through the executor of her will, Bank of America National Trust and Savings Association, as plaintiff, brought this action against Ida Hennelly, defendant and respondent, to quiet title to two parcels of realty. One consisted of a 20-acre parcel, and the other consisted of two lots. Plaintiff's complaint sets up a certain disputed quitclaim deed in which Ida Hennelly, Dorothy J. Goss, and Margaret R. Crow are named as grantors and Rose A. Leverone as grantee. There was a provision contained therein that "the property herein described is to revert to the grantors, upon the death of the grantee, one-half to Ida Hennelly and one-fourth each to Dorothy Goss and Margaret Crow". This deed was acknowledged January 8, 1937, and recorded May 24, 1937, at the request of Margaret Crow.

By the terms of the will of A. J. Leverone, deceased, he gave to his wife "Rosa * * * during the term of her natural life, the net income arising from all of my estate * * *." It then provided that upon her death "I give * * * all of my estate then remaining as follows, to-wit; one-half thereof to my said daughter, Ida Hennelly, one-fourth thereof to the said Dorothy Goss, and the remaining one-fourth to the said Margaret Purdy (Crow)." Rose A. Leverone died December 10, 1947.

Defendant, in her answer, denied plaintiff's claim to the property, set up several defenses to plaintiff's claim and asked for affirmative relief. Defendant testified that during the administration of the estate the heirs and legatees above named figured out between themselves a division of the property of the estate; that on January 8, 1937, they all went to the office of the attorney for the estate and there executed deeds one to another between themselves, dividing the property of said estate; that there were four deeds executed at that time; that Rose A. Leverone stated that that was the way she wanted it. This testimony was corroborated by the other grantees. Defendant Ida Hennelly's deed to her portion of the property was then delivered to her.

In the decree of distribution, dated January 8, 1937, the same date the deeds were acknowledged, there was a clause: "It is further ordered, adjudged and decreed that the residue of said estate * * * be distributed, under the will herein, and the following deeds for division made by all of the heirs hereunder, as follows * * * To Rose A. Leverone * * *" the property above described in her complaint.

The trial court found generally that on January 8th four deeds were executed by the above-named heirs, by which the devisees under the will divided among themselves the various properties of the deceased; that these deeds all granted the fee title to the property described there, except the deed to Rose A. Leverone, which vested only a life estate in her. The court then specifically found that she was fully cognizant of the presence in the above-mentioned deed of the reversionary clause and that she accepted the deed with that knowledge; that all of said deeds were executed and that full information of the execution of them was given to the Superior Court at the time of making and giving said decree of distribution, and that said deeds referred to in the decree of distribution are the same four deeds hereinabove mentioned, and that it was the intention of the court in the making and giving of said decree of distribution to incorporate said deeds by reference and to cause said decree to be read in conjunction with the deeds and the will of A. G. Leverone.

It is plaintiff's position that notwithstanding the provisions of the will and the quitclaim deed in reference to the life estate, the decree of distribution granted the estate to her unconditionally, without any reversionary clause; that it was final and conclusive as to the rights of the parties, and that plaintiff was entitled to judgment as a matter of law, citing Probate Code Secs. 1020 and 1021, and such cases as Wells Fargo Bank, etc. Co. v. Superior Court, 32 Cal.2d 1, 193 P.2d 721; In re Estate of Madsen, 31 Cal.App.2d 240, 87 P.2d 903; Miller v. Pitman, 180 Cal. 540, 182 P. 50; In re Estate of Wallace, 98 Cal.App.2d 285, 219 P.2d 910; and In re Estate of Norris, 78 Cal.App.2d 152, 177 P.2d 299.

[1] It is the general rule that under the doctrine of res judicata a will cannot be looked to for the purpose of impeaching or contradicting the plain and unambiguous terms of the decree of distribution, where the decree has become final. In re Estate of Wallace, supra.

The decree here under discussion, by its own terms, makes reference to the will and deeds for a complete distribution of the property. Under the will, Rose A. Leverone never had more than a life estate in any of the property of said estate. Her estate was but a right to the *net income* during her life. It further shows that under the terms of the will Ida Hennelly, Dorothy J. Goss, and Margaret R. Crow, nee Purdy, were the remaindermen in fee. While said administration was pending the heirs at law and devisees under said will all met together to consummate an agreement for the division of the property of said estate, at which time four deeds were executed and thereafter recorded by each of the respective grantees. The record shows without conflict that Rose A. Leverone had full knowledge of the existence of the reversionary clause in said deed and she accepted the deed with that knowledge. The decree of distribution, by its terms, indicates that full information of the execution of said four deeds was given to the court at the time of the rendition of the decree of distribution and that the four deeds introduced in evidence are the same "deeds for division" referred to in said decree of distribution. The record clearly shows an intention on the part of the court at the time of the rendition and giving of said decree of distribution to incorporate said deeds by reference and to cause the decree of distribution to be read in conjunction with the deeds and the will. The findings in this respect are fully supported by the evidence.

[2] The facts here presented constitute an exception to the general rules contended for by the plaintiff, and bring it well within the rule announced in Horton v. Winbigler, 175 Cal. 149, 157, 165 P. 423; Clark v. Capital National Bank, 91 Cal.App.2d 865, 868, 206 P.2d 16; and Lloyd v. First National Trust & Savings Bank, 101 Cal.App.2d 579, 225 P.2d 962.

[3] Since the estate of the decedent vested in the legatees under the will at the time of death, Western Pacific Railway Co. v. Godfrey, 166 Cal. 346, 349, 136 P. 284 there was ample title in Ida Hennelly, Dorothy J. Goss and Margaret R. Crow to support the reversionary clause in the deed executed by them and accepted by Rose A. Leverone prior to distribution. Kingsbury v. Ross, 217 Cal. 484, 19 P.2d 784; Chever v. Ching Hong Poy, 82 Cal. 68, 22 P. 1081;

Martinovich v. Marsicano, 137 Cal. 354, 70 P. 459; Cooley v. Miller & Lux, 156 Cal. 510, 105 P. 981.

Judgment affirmed.

MUSSELL, J., concurs.

102 Cal.App.2d 754

HENNELLY v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 4089.

District Court of Appeal, Fourth District, California.

March 8, 1951.

Ida Hennelly brought action against the Bank of America National Trust and Savings Association, as executors, etc., and others to set aside a deed. The Superior Court of Fresno County, Arthur C. Shepard, J., rendered a judgment for the defendants, and the plaintiff appealed. The District Court of Appeal, Griffin, acting P. J., held that evidence sustained finding that there was an unqualified delivery of the deed by plaintiff and that deed should not be set aside.

Judgment affirmed.

1. Deeds 🔑194(5)

Where deed was duly signed and executed by grantors and was delivered to title company by agent of grantee and was recorded and returned to grantee, possession of deed by grantee gave rise to an inference that deed was duly delivered.

2. Deeds 🔑194(1)

After delivery of deed was in fact made by remaindermen to life tenant, so that life tenant could sell realty, and sale was consummated by life tenant, burden was on one of the remaindermen to establish to satisfaction of court in action to set aside deed, that some unperformed condition was attached to delivery of deed.

3. Evidence 🔑595

If a court can reasonably infer from primary facts proven that material fact exists, party proving the primary facts has introduced sufficient evidence to entitle him to have court decide issue.

4. Evidence 🔑595, 596(1)

Court is not required to accept as true all direct evidence offered in opposition to an inference, and if the direct evidence is not clear, positive and uncontradicted, and is not free from doubt, court is entitled to reject it.

5. Trial 🔑142, 382

Whether a particular inference can be drawn from certain evidence is a question of law, but whether an inference shall be drawn, in any given case, is a question of fact for trial court or jury as the case may be.

6. Evidence 🔑588

Where testimony in action to set aside deed, on ground that it had not been delivered, presented a question of fact, it was incumbent on trial court as trier of the facts to make an honest effort to arrive at the truth and to disregard testimony which, for valid reasons, impressed trial court as untrustworthy.

7. Witnesses 🔑364

In passing on credibility of plaintiff as witness, trial court as trier of the facts was authorized to consider plaintiff's interest in the result of the case.

8. Deeds 🔑208(1)

In action to set aside deed, on ground that there had never been unqualified delivery of the deed and that delivery was to be conditioned on establishment of a trust fund which was never established, evidence sustained finding that there was an unqualified delivery.

9. Appeal and error 🔑1011(1)

Findings on conflicting evidence could not be disturbed on appeal.

10. Appeal and error 🔑891

The granting by District Court of Appeal of an application to take additional testimony is subject to limitations.

11. Appeal and error 🔑891

Motion to take additional testimony would be denied by District Court of Appeal, where, even if evidence were produced, it would not be determinative of the case.

Ralph E. Wallace, Fresno, for appellant.

John D. Chinello and Harris, Willey & Harris, Fresno, for respondents.

GRIFFIN, Acting Presiding Justice.

Action to set aside deed. This is a companion case to Bank of America, etc. v. Hennelly, Cal.App., 228 P.2d 76, this day decided. Under the decree there affirmed, plaintiff in this action was the owner in fee of an undivided one-half interest, and Dorothy J. Goss and Margaret R. Crow were the fee owners of an undivided one-fourth interest each in and to certain real property situated in the County of Fresno, all subject to the life estate of Rose A. Leverone, mother of Ida Hennelly. In 1946, Mrs. Leverone listed that property with a real estate broker for sale. He produced a purchaser at the price of $17,000, payable in installments. After the opening of the escrow it was discovered by the title company that Mrs. Leverone was only a life tenant and that the fee title was held as above described. The title company prepared a quitclaim deed dated December 14, 1946, wherein the fee owners were named as grantors and Mrs. Leverone the grantee, covering the above-mentioned property, and gave it to the broker to secure the signatures of the fee owners. Several conferences were had with them. Thereafter, Dorothy J. Goss and Margaret R. Crow signed the deed on July 30, 1947, and no question arises in this action as to their quitclaim deed.

Plaintiff Ida Hennelly testified that she refused to sign such a deed unless Mrs. Leverone, her mother, would put the money, the proceeds of the sale, in trust, conditioned that her mother receive a life estate therein with remainder over to the above-mentioned grantors; that the parties met in the office of attorney Saylor, and that she there signed the deed, but that she instructed the attorney to hold it until such a trust agreement was executed; that the attorney locked the deed in his desk and shortly thereafter, on December 1, 1947, the attorney died. Mrs. Leverone died on December 10, 1947. Between June and September, 1947, Mr. Chinello, attorney for Mrs. Leverone, secured the deed from Mr. Saylor and delivered it to the title company for use in connection with the sale of the property. It was stipulated that Mr. Chinello did not know of the existence of any purported condition or restriction as to the delivery of the deed until this action was brought in July, 1948. The deed was recorded September 12, 1947, and the sale of the property was completed about that time. Ida Hennelly further testified that she did not authorize the delivery of the deed. However, she admitted that she knew of the impending sale and that in September, 1947, she found the recorded deed in her mother's possession and realized that the sale had been completed. She testified she did not know whether a trust agreement had been signed by her mother. She made no effort to advise the title company or the purchasers of the existence of any purported condition affecting the delivery of the deed, prior to the filing of this action. Her testimony was corroborated to some extent in reference to her insistence that a trust be created so that her mother would not mishandle the proceeds of the sale due to her addiction to drink. The lips of Attorney Saylor and Mrs. Leverone are sealed by death and accordingly their testimony as to the circumstances surrounding the execution and delivery of the deed is not available. Apparently the other grantors saw no reason why plaintiff should create any trust in reference to the sale of the property because, as they stated, it was plaintiff's mother's money and she should be able to have it. They were not exacting any such condition in connection with their quitclaim deed.

After hearing all the testimony and considering the evidence, in connection with the inferences and presumptions arising therefrom, the trial court found that about the 18th of June, 1947, plaintiff executed the quitclaim deed quitclaiming to her mother all of her right, title and interest in and to the real property described; that on that date plaintiff delivered the deed to her attorney, Mr. Saylor, with instructions to deliver said deed to Mrs. Leverone or her attorney; that the deed was not deposited with Mr. Saylor with instructions to deliver it as and when the grantee therein named had executed and delivered to plaintiff the trust agreement as indicated by her; that about June 18, 1947, Mr. Saylor delivered the deed to Attorney Chinello, without limitation and free of any restrictions or conditions attached to said delivery, and that thereafter Attorney Chinello delivered it to the Title Company for recordation, pursuant to the instructions of Mrs. Leverone. Judgment was that plaintiff had no right, title or interest in or to the property.

Plaintiff's main point is that the evidence is insufficient to support the finding that there was an unqualified delivery of the deed by plaintiff to the purchasers of the property, on the theory that there is no testimony opposed to that of the plaintiff in reference to the claimed qualified delivery of the deed. Defendants argue that a *presumption* of delivery arose from the fact that Mrs. Leverone, the grantee, actually had possession of the recorded deed and that this *presumption* of delivery alone is sufficient to support the finding of the trial court; that the trial court, under the evidence, was justified in finding that the deed was delivered free of any conditions, particularly where clear and convincing proof of nondelivery was insufficient to completely dispel the *presumption;* that if this were not the rule, titles could be easily defeated and no one could be regarded as being secure in the ownership of land, under the circumstances related, particularly where the rights of innocent third parties have intervened, citing Ogg v. Gunderson, 74 Cal.App.2d 384, 168 P.2d 793; White v. Waters, 68 Cal.App.2d 517, 157 P.2d 434; Butler v. Woodburn, 19 Cal.2d 420, 425, 122 P.2d 17; Severn v. Ruhde, 58 Cal.App.2d 704, 707, 137 P.2d 466; Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; Central Trust Co. v. Stoddard, 4 Cal.App. 647, 649, 88 P. 806; 9 Cal.Jur. p. 187, Sec. 74; Safeway Stores, Inc. v. King Lumber Co., 45 Cal.App.2d 17, 23, 113 P.2d 483; Pomper v. Behnke, 97 Cal.App. 628, 276 P. 122; and Miller v. Jansen, 21 Cal.2d 473, 477, 132 P.2d 801.

It is plaintiff's argument that the trial court erroneously confused a *presumption* with an *inference,* as defined by secs. 1958 and 1959 of the Code of Civil Procedure, and contends that under Miller v. Jansen, supra, any *inference* arising in favor of defendant was completely dispelled as a matter of law by the clear, positive, and uncontradicted evidence of the witnesses for plaintiff. Also cited is Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 70, 77 P.2d 1059; Montanya v. Brown, 31 Cal.App.2d 642, 645, 88 P.2d 745; and Bourne v. Northern Counties T. Ins. Co., 4 Cal.App.2d 69, 40 P.2d 583.

Miller v. Jansen, supra, is factually different from the instant case. There a duly executed but undelivered deed was found with the grantor's property at the time of her death. The trial court held that there was no delivery shown. Defendant relied upon the presumption mentioned in sec. 1055 of the Civil Code that a grant duly executed is presumed to have been delivered at its date. The Supreme Court there held that a duly signed and *delivered* instrument is presumed to have been *delivered at its date,* not that it was presumed to have been *delivered.*

[1–9] The facts in the instant case show that the deed was duly signed and executed and was in fact delivered to the title company by the agent of the grantee and was recorded and returned to the grantee. Under these circumstances possession by the grantee gives rise to an *inference* that the instrument was duly delivered. Miller v. Jansen, supra, 21 Cal.2d at page 477, 132 P.2d 801 and cases cited. After delivery of the deed was in fact made, and the deal consummated, the burden was upon the grantor to establish the fact to the satisfaction of the court that some unperformed condition was attached to its delivery. Under sec. 1056 of the Civil Code, a grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made. The rule is that it is not always possible for a party to a law suit to introduce evidence directly bearing upon the existence of a fact that he is attempting to prove. The evidence available to him may serve only to establish the existence of certain primary facts that are logically connected with the material facts. If a court can reasonably infer from these primary facts that the material fact exists, the party has introduced sufficient evidence to entitle him to have the court decide the issue, and it is not the rule that the court must accept as true all direct evidence offered in opposition to an inference. If the direct evidence to the contrary is not clear, positive, and uncontradicted, and is not free from any doubt, the court is entitled to reject it. Huddy v. Chronicle Publishing Co., 15 Cal.2d 554, 568, 103 P.2d 421; Tsirlis v. Standard Oil Co., 32 Cal.App.2d 469, 476, 90 P.2d 128; Blank v. Coffin, 20 Cal.2d 457, 460, 126 P.2d 868. Whether a particular inference can be drawn from certain evidence is a question of law, but whether an inference shall be drawn, in any given case, is a question of fact for the trial court or jury as the case may be. 10 Cal.Jur. 738, 739, sec. 60; Garland v. Hirsh, 74 Cal.App.2d 629, 169 P.2d 405. It is hardly consistent that if such a condition had been attached to the delivery of such a deed, plaintiff would have remained silent after learning of the recordation of said deed and the completion of the sale to the purchaser for approximately a year before taking any action. It would appear more than reasonable that if such conditional delivery were attached to the deed, plaintiff, upon discovery of the fact that it had been recorded and the sale completed, would have immediately advised the purchasers, the title company, her mother, the grantee, or her attorney, of the claimed fact, and apprised them of this claim prior to her mother's death. Clearly, the innocent purchaser did not know and could not foresee that plaintiff, in July, 1948, would assert that there had been no delivery of the deed from plaintiff to her mother. Safeway Stores, Inc., v. King Lumber Co., 45 Cal.App.2d 17, 23, 113 P.2d 483; Schnier v. Percival, 83 Cal.App. 470, 256 P. 1109; 1 Cal.Jur. 773, sec. 65. In the instant case the testimony presented a question of fact and it was incumbent on the trial court to make an honest effort to arrive at the truth and to disregard testimony which, for valid reasons, impressed it as untrustworthy. In passing on the credibility of the witness it was authorized to consider plaintiff's interest in the result of the case. 27 Cal.Jur. 180, sec. 154; Sec. 2061, Par. 2, C.C.P. It was not shown as a fact that Mrs. Leverone did not sign such a trust agreement. Plaintiff's testimony was that "I don't know if anything like that was done." Therefore, the questions as to whether there had been a delivery of the deed and as to whether or not there was a condition attached to its delivery were factual questions for the trial court to determine. The findings in this respect may not be disturbed on appeal. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301.

Several other claimed equitable reasons are advanced by plaintiff why the judgment should be in her favor. We have carefully analyzed them and conclude that they would not authorize this court to overturn the findings of the trial court that plaintiff was not entitled to the relief sought.

Plaintiff moved, in this court, over objection, for permission to take additional testimony under rule 23(b), Rules on Appeal. That motion was submitted to be determined at this time. The affidavit recites, in general, that the purchasers of the property here involved paid $5,000 on the original purchase price and agreed to pay $1,000 in annual payments thereafter on the trust deed and note for the balance of $12,000; that at the present time three annual payments, plus interest, are past due; that on February 10, 1951, the purchasers informed plaintiff's attorney they did not intend to pay any more on the note and trust deed and that a notice of default had been filed at the instance of the defendant Bank of America.

[10, 11] The granting of an application to take additional testimony is subject to several limitations. In re Estate of Schluttig, Cal.App., 218 P.2d 819; Tupman v. Haberkern, 208 Cal. 256, 268, 280 P. 970; Burton v. Los Angeles Ry. Corp., 79 Cal.App.2d 605, 180 P.2d 367; Helmer v. Helmer, 87 Cal.App.2d 682, 197 P.2d 558. In Wight v. Rohlffs, 9 Cal.2d 620, 72 P.2d 142, the court held that such a motion should be denied where the proposed evidence, if received, would not have been determinative of the case. Here, the court found that the deed was delivered, subject to no conditions. Even if the proffered evidence were produced it would not be determinative of the case. Accordingly the motion should be denied.

Motion to take additional testimony denied. Judgment affirmed.

MUSSELL, J., concurs.

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102 Cal.App.2d 680

McDONALD et al. v. HEWLETT.

Civ. 14713.

District Court of Appeal, First District, Division 1, California.

March 7, 1951.

Rehearing Denied April 6, 1951.

Hearing Denied May 3, 1951.

Action by Amanda Matilda McDonald, as administratrix of the estate of Agnes Kromrey, deceased and others, against George Hewlett, to recover money and personal property wherein defendant cross complained and counter claimed. Plaintiff recovered judgment in the Superior Court in and for the City and County of San Francisco. Edward P. Murphy, J., and the defendant appealed. The District Court of Appeal, Peters, P. J., held that the evidence sustained the finding that no valid gift was made, and that the failure of the respondent to file the statutory affidavit where defendant pleaded in hæc verba gift document in his answer, did not establish incontrovertibly a valid delivery of the document.

Judgment affirmed.

1. Attorney and client 🔑123(2)

Evidence sustained finding that no valid gift of personalty was made by client to attorney.

2. Attorney and client 🔑123(1)
Trusts 🔑283(1)

Under the civil code, there is a rebuttable presumption of undue influence and insufficient consideration in transactions involving a trustee and beneficiary, and the code includes the relationship of attorney and client. Civ.Code, § 2235.

3. Trusts 🔑283(1)

Under the code, a trustee may deal with beneficiary but if he does so in such a manner as to obtain an advantage, the trustee has the burden of showing by evidence that the transaction was fair. Civ. Code, § 2235.

4. Gifts 🔑47(3)

Where alleged donor is lacking in such mental vigor as to enable him to protect himself against imposition, the donee has the burden of showing that the transaction resulting in gift was fair and free from undue influence.

5. Gifts 🔑82(1)

Long delay in disclosing an alleged transfer by gift or the fact that there was no disclosure until after the death of the donor are circumstances rendering the testimony of the alleged donee subject to suspicion.

6. Evidence 🔑590

Trial court was not bound by testimony of witnesses who had an obvious interest in the case.

7. Attorney and client 🔑123(2)

Where attorney allegedly received personalty from client by gift, burden was on attorney when the transaction was attacked, to rebut presumption arising where an attorney profits from dealing with his client.

8. Evidence 🔑595

A disputable presumption may be refuted by evidence of facts, but it is normally for the trial court to determine whether the proffered testimony outweighs the presumption.

9. Evidence 🔑595

Where the trial court reasonably does not believe the rebutting testimony a disputable presumption remains unimpaired.

10. Gifts 🔑49(3)

While the introduction into evidence of the gift instrument establishes a prima facie case of legal delivery, presumption thus created is not conclusive and does not establish the requisite element of the intent.

11. Pleading 🔑290(3)

Failure to file affidavit required by the code section admits the genuineness and the due execution of the instrument sued on; that it was assigned and was not spurious; but it does not establish incontrovertibly a valid delivery thereof. Code Civ.Proc. § 448.

12. Pleading 🔑290(3)

Where defendant pleaded in hæc verba the gift document in his answer, failure of respondent to file the statutory affidavit, while admitting that the document was signed and was not spurious, did not establish incontrovertibly a valid delivery thereof. Code Civ.Proc. § 448.

George K. Ford, San Francisco, for appellant.

Louis Ferrari, James F. Brennan, San Francisco, for respondents.

PETERS, Presiding Justice.

Amanda McDonald, as the administratrix of the estates of Agnes, August, Fred and George Kromrey, brought this action against George Hewlett, an attorney at law, to recover some $50,000 of money and personal property alleged to belong to the Kromrey estates, possession of which, it is alleged, was secured by Hewlett from George Kromrey by fraud and deceit and in violation of the confidential relationship existing between the two. Hewlett's basic defense to the action was that the money and property had been received from George Kromrey as a gift. He also cross-complained and counterclaimed, but offered no evidence to support these pleadings and makes no argument in his briefs on the issues thus created.

The trial court found that the relationship of attorney and client existed between Hewlett and George Kromrey when the alleged gift was made; that Hewlett secured possession of some $40,060 belonging to Kromrey fraudulently, unlawfully and in violation of the confidential relationship. The court concluded that there was no valid gift, and entered its judgment accordingly. Hewlett appeals.

The evidence undoubtedly supports the findings. This is the second appeal to reach this court in which the transactions here involved have come under court scrutiny. In addition to the alleged gifts here involved, Hewlett succeeded in getting himself appointed co-administrator of the estate of Fred Kromrey, and administrator of the estates of August and Agnes Kromrey. Because of the more than questionable manner in which these documents were secured, and because of the actions of Hewlett in connection with the very transactions here involved, Hewlett was removed as administrator of these estates. This court affirmed the orders of removal. In re Estate of Kromrey, 98 Cal.App.2d 639, 220 P.2d 805. Reference is made to that case for a statement of facts supplementary to those here set forth.

Hewlett is an attorney, having practiced since 1904. Since 1944 he has been attorney for George Kromrey, and handled several matters for him. In 1948 Kromrey was a man of about 54 years of age who had not worked for about five years, having been ill for about that time. After his death, which occurred on February 14, 1949, it was discovered that he had been suffering for over five years from a large tumor of the pituitary gland which extended up into his brain, and which the medical evidence shows could have affected his vision and his brain. George Kromrey was the administrator of the estates of August and Agnes Kromrey, his mother and father, and of Fred Kromrey, his brother. Fred died in 1943, and August and Agnes died in 1947.

Amanda McDonald has lived in the lower flat of the Kromrey house since 1940, the Kromreys occupying the upper flat. After the death of August and Agnes, George continued to live in the upper flat, but took all of his meals with Mrs. McDonald. She generally looked out for George and nursed him through his frequent sick spells.

On October 28, 1948, George had a bad sick spell and his doctor, after finding that George was very sluggish and unable to answer questions, sent him to the psychiatric department of the San Francisco Hospital. Mrs. McDonald had accompanied Kromrey to the hospital and testified that he was then in a dazed stupor. She discovered that Hewlett was Kromrey's attorney, and telephoned to him and told him of his client's condition. Hewlett requested Mrs. McDonald to come to his office the next morning. This she did. When she informed Hewlett that Kromrey's father, mother and brother were dead, Hewlett dictated, in the presence of Mrs. McDonald, four documents, one of which nominated Hewlett as co-administrator of the estate of Fred, two nominated Hewlett as administrator of the estates of August and Agnes, and the fourth appointed Hewlett general agent for George Kromrey, with control over his property. After the four documents were transcribed, Hewlett, his son Palmer, and Mrs. McDonald proceeded to the hospital. Mrs. McDonald testified that Kromrey was "laying there in a very dull stupor * * *. You wouldn't say unconscious, but just a stupor * * *. He never spoke." Hewlett testified that Kromrey requested that Hewlett take care of his business affairs, but Mrs. McDonald testified that Kromrey never spoke a word; that "Mr. Kromrey could not talk"; that she tried to hold Kromrey up to sign the documents, but he was just a dead weight and she could not manage it, so Palmer Hewlett held Kromrey up; George Hewlett then put a pen in Kromrey's hand and guided the hand and spelled out the names while Kromrey signed the four documents. Palmer notarized them. Admittedly, no explanation of the nature of these documents was given by Hewlett to Kromrey. Mrs. McDonald testified that as they were leaving the hospital Hewlett tried to make a "deal" with her, by suggesting that when Kromrey died she put in a claim for $3,000 in the estate for services rendered. Mrs. McDonald replied that she was not interested in any "deal," that "All I care about is Mr. Kromrey's well-being."

Hewlett came into possession of the $40,060 here involved under the following circumstances: The four documents were signed on October 29, 1948. The next day Palmer Hewlett and Hewlett's secretary called at the Kromrey house and demanded that Mrs. McDonald deliver to them Kromrey's property. They visited Kromrey's flat and Palmer and the secretary removed a drawer full of miscellaneous personal property and documents, including an envelope containing currency which the trial court found, and Hewlett admitted, contained $8,600. Palmer refused to count the money in the presence of Mrs. McDonald and refused to give her a receipt, stating that it was not necessary. Defendant Hewlett, while his son and secretary were in the house, was waiting across the street. Hewlett was somewhat evasive as to what had happened to this money, but he finally admitted that on November 1, 1948, he put it in a safe deposit box at the Haight-Asbury branch of the American Trust Co., the box being taken in the name of Hewlett and his son Palmer.

The second sum of $31,460 was received by Hewlett from Mrs. McDonald on the night of November 2, 1948. This money had been given to Mrs. McDonald by Kromrey to keep for him. Mrs. McDonald, while Kromrey was in the hospital, asked him what he wanted done with the money, and he gave her written instructions that the money should be deposited in the bank. Hewlett discovered that she had the money and demanded possession of it, saying that it belonged to the three estates, and threatening that unless it was paid over to him the government would assess penalties and throw Kromrey into jail. Mrs. McDonald showed Hewlett Kromrey's instructions, but Hewlett replied that he was administrator of the estates and agent for Kromrey, and was not interested in Kromrey's wishes. Mrs. McDonald insisted that the money be counted and a receipt given to her. When this was done she turned the $31,460 over to Hewlett. Hewlett, after some evasion, admitted that that night he tried to put this money in a safe deposit box at a day and night bank, but that department of the bank was not open. The next day Palmer and Hewlett rented a new safe deposit box at the same bank in which the $8,600 had been placed. Only Hewlett and Palmer had access to this box. Hewlett testified that he told the bank manager that the money belonged to Kromrey, and this was corroborated by the bank official, but that official also testified that he suggested that the money be put into a trustee account. This, Hewlett refused to do.

Hewlett claims that both of these deposits were given to him as a gift by Kromrey on November 7th and 8th, 1948. Another son of Hewlett's—George, Jr. by name—had visited Kromrey on November 6, 1948. He testified that at that time Kromrey praised Hewlett and told George, Jr. that he wanted to make a gift of all the money to Hewlett. George, Jr. conveyed this message to his father, and on November 7, 1948, George, Jr. and Hewlett visited Kromrey at the hospital. No one else was present. Hewlett testified that he asked Kromrey if he wanted to make a gift of the money to him; that Kromrey stated that he did; that he fortuitously had the $8,600 with him, and had a receipt for the $31,460; that he handed the envelope and the receipt to Kromrey who handed them back to him; that he thanked Kromrey and suggested that a paper should be drawn up recognizing the gift. No doctor, nurse or other disinterested person was called in to witness the alleged gift. On November 8, 1948, Hewlett, this time accompanied by Palmer and his secretary, again visited Kromrey. Hewlett presented to Kromrey, and Kromrey signed, the alleged gift document. Palmer and the secretary signed as witnesses. The affidavits of the witnesses were later notarized by a notary not then present. The document reads as follows:

"San Francisco, California

"November 8, 1948

"I have delivered, and now confirm delivery, to George Hewlett, my good friend, all of my money and personal property or all to which I am entitled as heir, and I give him the same absolutely, and he has accepted the same.

"George A. Kromrey—

"Witnesses: Mae Montgomery

"Palmer B. Hewlett"

On December 2, 1948, Hewlett received from Kromrey a formal notification that the power of attorney theretofore executed by Kromrey was rescinded. Hewlett also received a letter dated December 15, 1948, from an attorney who had been retained by Kromrey referring to the fact that the attorney had tried unsuccessfully to communicate with Hewlett, referring to the four documents executed on October 29, 1948, stating that the power of attorney had already been revoked, cancelling the other documents and demanding a return of all moneys and personal property in Hewlett's possession. Hewlett testified that he did not return the money because "I had a gift and I didn't care how many demands they made on me." It is quite significant, however, that until after Kromrey died on February 14, 1949, Hewlett did not tell Kromrey or his attorneys that he made any claim to the property or money in his possession. Although Mrs. McDonald telephoned to Hewlett and tried to get him to visit Kromrey, Hewlett never appeared.

Hewlett testified that Kromrey read and signed the document dated November 8, 1948, without the aid of glasses. Mrs. McDonald testified that, although Kromrey did not wear glasses, he used a magnifying glass to read and could not read without such assistance. There was medical evidence that the tumor that Kromrey had was close to the optic nerve, and that one of the "characteristic symptoms of a tumor in this location" would be "likely" to cause "defective vision," would be likely to cause "forgetfulness" and a "confused and disoriented state of mind," and accounted for the "blackouts" from which Kromrey suffered. A doctor who had attended Kromrey at the hospital testified for Hewlett that Kromrey's vision was not markedly impaired, but he could not testify whether Kromrey could or could not read without assistance. This same doctor had written in the hospital chart on October 28, 1948, that Kromrey had "Marked physical and mental lethargy" and he had also written therein that when he asked Kromrey his source of income the patient replied that "he gets money that just floats around."

Hewlett also produced the testimony of two fellow students of his son George, Jr., who had visited Kromrey at George, Jr.'s request, to the effect that they saw Kromrey read without glasses. A fellow patient of Kromrey testified to the same effect. The secretary of Hewlett likewise so testified, and a son-in-law of Hewlett stated that on November 15, 1948, Kromrey told him that he had made a gift to Hewlett.

[1-3] A mere recital of this evidence demonstrates that the finding that no valid gift was made, because of fraud and undue influence exerted by Hewlett in violation of the confidential relationship is amply supported by the evidence. The purported gift was unfair and unconscionable. If valid, Kromrey would practically have made himself a pauper, and this at a time when he was unable to work and needed medical and hospital care. The surrounding circumstances render suspect Hewlett's entire conduct in the matter. There can be no doubt that under section 2235 of the Civil Code there is a rebuttable presumption of undue influence and insufficient consideration in transactions involving a trustee and beneficiary, and that this section includes the relationship of attorney and client. Plxweve Aircraft Co. v. Greenwood, 61 Cal.App.2d 21, 141 P.2d 933. As was said in that case, 61 Cal.App.2d at page 24, 141 P.2d at page 953: "'This does not mean that a trustee may not deal with his beneficiary. But, if he does deal with him in such manner as to obtain an advantage, the trustee has the burden of showing by evidence that the transaction was fair. [Citing cases.]'" See also, Moore v. Hoar, 27 Cal.App.2d 269, 288, 81 P.2d 226.

[4, 5] It is up to the donee to show that the transaction was fair and free from undue influence. Bohn v. Gruver, 111 Cal.App. 386, 394, 295 P. 891. As was said in that case, 111 Cal.App. at page 393, 295 P. at page 894: "The fact that the testator was old and feeble was in view of defendant's claim a suspicious circumstance [citing a case]; and where the alleged donor is lacking in such mental vigor as to enable him to protect himself against imposition, although his mental weakness is not such as to justify his being regarded as totally incapacitated, an alleged gift *inter vivos* will be presumed to be fraudulent or secured by undue influence. [Citing cases.] It is also the rule that long delay in disclosing an alleged transfer, or the fact that there was no disclosure until after the death of the donor, are circumstances which render the testimony of the claimant subject to suspicion [citing cases]".

Another good case discussing the problem is In re Estate of Phillipi, 76 Cal. App.2d 100, 102, 172 P.2d 377, 378, where the court stated: "That Mr. Wilson was the attorney of the testator and that a confidential relationship existed between them is not questioned. Where such a situation exists the rebuttable presumption of fraud or undue influence arises where the attorney profits from his dealings with his client. That presumption can only be overcome by clear and satisfactory evidence that the transaction between the attorney and his client was fair and equitable and that the attorney had taken no advantage of the relationship and that the client was fully informed as to all matters relative to the transaction."

See, also, In re Estate of Witt, 198 Cal. 407, 245 P. 197.

[6, 7] The most that can be said in support of the appeal is that Hewlett offered evidence, mainly of himself, his relatives or his secretary, that would have supported a finding that the presumptions involved had been rebutted. But the trial court did not believe these witnesses. In view of the obvious interest of most of these witnesses the trial court was not bound by their testimony. The burden was on Hewlett to rebut the presumptions. This he failed to do. Moreover, the mental and physical condition of Kromrey, the nature of the gift, its palpable unfairness to Kromrey, and the other surrounding circumstances all support, affirmatively, the findings of the trial court.

[8, 9] Hewlett makes several technical contentions in support of his appeal. He first argues that the mere introduction of the gift writing dispelled the effect of the presumption of undue influence. To state the contention is to refute it. The contention assumes the validity of the gift instrument, the very point in issue. Of course, a disputable presumption may be refuted by evidence of the facts, but it is normally for the trial court to determine whether the proffered testimony outweighs the presumption. Steward v. Paige, 90 Cal.App.2d 820, 824, 203 P.2d 858; Khoury v. Barham, 85 Cal.App.2d 202, 212, 192 P.2d 823. Obviously, where the trial court reasonably does not believe the rebutting testimony the presumption is unimpaired.

[10] Hewlett next argues that the gift instrument (which was introduced into evidence by respondent) established a prima facie case of legal delivery, citing Dinneen v. Younger, 57 Cal.App.2d 200, 134 P.2d 323. That case undoubtedly stated this well settled rule, but it also stated the equally well settled limitation on the rule, namely, that "The presumption of legal delivery, thus created, is not conclusive," 57 Cal.App.2d at page 204, 134 P.2d at page 325, and does not establish the requisite element of intent. All of the cases cited by Hewlett for the proposition that the introduction of the gift document established a prima facie case of valid delivery, also hold that such prima facie case can be contradicted and overcome by other evidence. People v. Mahoney, 13 Cal.2d 729, 91 P.2d 1029; Berry v. Chaplin, 74 Cal.App.2d 652, 169 P.2d 442. That is this case.

The last point made by Hewlett that warrants discussion is that he pleaded *in haec verba* the gift document in his answer and respondent failed to file the affidavit referred to in section 448 of the Code of Civil Procedure. This, says appellant, results in an admission of the genuineness and due execution of the document, so that the finding against the validity of the gift cannot stand against this admission. The point lacks merit.

The trial court found that it was not true that Kromrey on the dates involved "made or confirmed a gift of the money, or any part thereof * * * to George Hewlett; that no gift was in fact ever made by said George August Kromrey to said George Hewlett of said sum of $40,060.00, or any part thereof."

[11, 12] It is true that failure to file the affidavit required by the code section admits "the genuineness and due execution" of the instrument—that is, that it was signed and is not spurious. But it does not establish incontrovertibly a valid delivery. In Miller v. McLaglen, 82 Cal.App.2d 219, 224, 186 P.2d 48, 51, the court, citing many cases, stated the proper rule as follows: "Failure to file the affidavit merely means that a plaintiff admits the due execution and genuineness of the instruments. He admits that the instruments were signed and delivered and that they are not spurious, nothing more. Failure to file an affidavit does not preclude a plaintiff from making any defense whatever to the affirmative allegations of the answer. He could, by evidence, controvert the instruments upon any and all grounds except that he could not controvert their due execution or their genuineness. He could controvert the instruments

by evidence of fraud, mistake, undue influence, mental incapacity, * * *."

The other points urged by appellant do not warrant discussion.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

102 Cal.App.2d 738

WYMAN v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO.

Civ. 14615.

District Court of Appeal, First District, Division 2, California.

March 8, 1951.

Rehearing Denied April 7, 1951.
See 229 P.2d 491.

Burt Wyman filed petition for writ of prohibition to prevent the Municipal Court of the City and County of San Francisco, etc., from revoking his probation. From a judgment of the Superior Court in and for the City and County of San Francisco, Theresa Meikle, J., granting the writ, respondent appealed. The District Court of Appeal, Dooling, J., held that permanent minutes of municipal court disclosed without uncertainty or ambiguity that petitioner had been placed on probation for 90 days only and that granting writ of prohibition to prevent revocation of probation in proceeding instituted more than 90 days after entry of order granting probation was not error.

Judgment affirmed.

1. Courts 🔑112

The clerk's rough minutes are not an official record but a mere memorandum kept by courtroom clerk for his own convenience and the permanent minutes constitute the only official record of the action of the court.

2. Courts 🔑117

The minutes of court import absolute verity unless and until amended.

3. Courts 🔑117

There is no presumption of correctness in favor of clerk's rough minutes, since they are not an official record, and without other supporting evidence they cannot be used to impeach the correctness of the official record of the court.

4. Appeal and error 🔑1170(10)

Failure of superior court to make findings in proceeding for writ of prohibition was not prejudicial, where from the evidence before it, court reached the only possible conclusion. Const. art. 6, § 4½.

5. Courts 🔑113

Entry in permanent minutes of municipal court disclosed without uncertainty or ambiguity that sentence for battery had been suspended and defendant placed on probation for 90 days only on condition he make restitution to injured party, notwithstanding statement in clerk's rough minutes that defendant had been placed on probation without specifying the period of such probation.

6. Prohibition 🔑3(4)

Granting writ of prohibition on ground that petitioner had no other plain, speedy and adequate remedy to prevent revocation of probation in proceeding instituted more than 90 days after entry of order placing petitioner on probation for 90 days, was not error.

7. Prohibition 🔑34

The question of the propriety of the remedy of prohibition is primarily for the trial court.

8. Prohibition 🔑27

Where the only evidence introduced supported judgment granting writ of prohibition, the rule that allegations of return, in absence of other evidence, must be taken as true was inapplicable.

◆

Fred N. Howser, Atty. Gen., B. Abbott Goldberg, Deputy Atty. Gen., for appellant.

Joseph P. Lacey, Harmon D. Skillin, San Francisco, for respondent.

DOOLING, Justice.

On March 10, 1949 Burt Wyman was adjudged guilty of battery in the Municipal Court. He was placed on probation on condition that he make restitution to the injured party. More than ninety days after the order granting probation was made proceedings were instituted to revoke his probation on the ground that he had failed to comply with its terms. Wyman petitioned the Superior Court for a writ of prohibition and from a judgment granting the writ respondent prosecutes this appeal.

The question presented on the merits is whether Wyman was placed on probation for the period of ninety days or for a period unspecified. The only evidence introduced on the hearing before the Superior Court was the clerk's rough minutes and the permanent minutes of the Municipal Court.

The rough minutes in the column headed "Judgment" contain the long-hand entry:

"90 days Co. Jail S.S. Def't placed on Prob. on condition he make restitution."

In the same column in the permanent minutes there is a rubber stamp entry supplemented by handwriting, the handwritten portion being designated by italics herein:

"The court orders the
defendant to be imprisoned in the county jail
for the period of —
days. S.S. on probation of *90 da*"
"*To make
full restitution.*"

In the adjoining column again appears the handwritten entry "90 da" with an arrow pointing to the entry last quoted. (It is agreed that "S.S." in both entries means "sentence suspended".)

There was produced in the trial court no evidence of any action taken in the Municipal Court to correct in any manner the entry of the court's order as it appears in the permanent minutes nor any evidence that this entry does not correctly embody the order actually made by the judge.

[1–3] The rough minutes are not an official record but a mere memorandum kept by the courtroom clerk for his own convenience and the permanent minutes constitute the only official record of the action of the court. Van Tiger v. Superior Court, 7 Cal.2d 377, 381–383, 60 P.2d 851; Jablon v. Henneberger, 33 Cal.2d 773, 775, 205 P.2d 1; Brownell v. Superior Court, 157 Cal. 703, 705–706, 109 P. 91. "The minutes import absolute verity unless and until amended." Shellhaas v. Petrolane, Ltd., 98 Cal.App.2d 171, 174, 219 P.2d 797, 800; In re Connor, 16 Cal.2d 701, 708, 108 P.2d 10; Govea v. Superior Court, 26 Cal.App.2d 27, 31–32, 78 P.2d 433. Since the rough minutes are not an official record there is no presumption of correctness in their favor and without other supporting evidence they cannot be used to impeach the correctness of the official record of the court.

[4, 5] The Superior Court made no findings but the absence of findings is not prejudicial, Cal.Const. Art. VI, sec. 4½, since from the evidence before it the court reached the only possible conclusion. There is neither uncertainty nor ambiguity in the official entry of the Municipal Court: "on probation of 90 da".

[6, 7] We cannot agree that the Superior Court erred in determining to issue the writ of prohibition. It was well within the discretion of that court to decide that petitioner had no other plain, speedy and adequate remedy. Hunter v. Justice's Court, 36 Cal.2d 315, 223 P.2d 465; Gorbacheff v. Justice's Court, 31 Cal.2d 178, 187 P.2d 407; Rescue Army v. Municipal Court, 28 Cal.2d 460, 171 P.2d 8. The question of the propriety of the remedy is primarily for the trial court. Ertman v. Municipal Court, 68 Cal.App.2d 143, 149, 155 P.2d 908, 156 P.2d 940.

[8] Since the only evidence introduced supports the judgment there is no room in this case for application of the rule that the allegations of the return, in the absence of other evidence, must be taken as true.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

102 Cal.App.2d 762

GAUSE et al. v. McCLELLAND.

Civ. 18053.

District Court of Appeal, Second District, Division 2, California.

March 9, 1951.

Rehearing Denied March 27, 1951.

Hearing Denied May 7, 1951.

W. S. Gause and Ruth Gause brought action against H. E. O. McClelland to recover damages for malicious prosecution. The Superior Court, Los Angeles County, Charles B. McCoy, J., entered judgment in favor of plaintiff, and defendant appealed. The District Court of Appeal, McComb, J., held that plaintiffs failed to prove one of the essential elements of their cause of action.

Reversed.

1. Malicious prosecution 🔑15

A tenant who was evicted by virtue of a writ of possession under a judgment in an unlawful detainer action which judgment was subsequently reversed on appeal could not recover in malicious prosecution action in absence of a showing of want of probable cause.

2. Malicious prosecution 🔑10

Courts are open for the purpose of determining existence of rights to which persons conceive themselves entitled and if a person brings action in good faith and without malice, he is not liable beyond the costs that may be assessed against him, however unfounded the action may be.

3. Landlord and tenant 🔑180(1)
Malicious prosecution 🔑10

There is no such thing as a cause of action for unlawful or malicious eviction of a tenant, but where the eviction arises from the wrongful use of judicial processes cause of action is one for malicious prosecution.

4. Malicious prosecution 🔑15

A finding that there was a want of probable cause is necessary to sustain an action for malicious prosecution.

5. Malicious prosecution 🔑56

Where there was neither an allegation in the complaint nor a finding by trial court that landlord instituted action for unlawful detainer without probable cause, but rather the evidence showed that a judgment had been entered in favor of landlord in unlawful detainer action and that there was no evidence of fraud by landlord in obtaining judgment, such judgment, though reversed on appeal gave rise to conclusive presumption of probable cause for the institution of the unlawful detainer action.

Horton & Horton, Joseph K. Horton and Russell A. Barker, Los Angeles, for appellant.

E. O. Leake and J. J. Leake, San Gabriel, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before the court without a jury in an action to recover damages for malicious prosecution, defendant appeals.

Facts: About June 13, 1943, plaintiffs leased from defendant from month to month, under a written lease, an apartment in the Graemere apartments, Los Angeles. Soon thereafter difficulties arose between the parties and on many occasions defendant refused to accept rent from plaintiffs and tried to evict them. In March, 1946, defendant stated to plaintiffs that she desired their apartment which adjoined the apartment occupied by herself and husband for the use of her mother. Plaintiffs did not accede to this request, whereupon defendant obtained permission from the office of price administration to file an action in unlawful detainer seeking possession of their apartment.

Such an action was filed on September 10, 1946, in the Municipal Court of Los Angeles and after trial a judgment was entered in favor of plaintiff in such action, defendant here. The defendants in the municipal court action appealed to the appellate department of the superior court. On January 10, 1947, that department reversed the judgment on the ground that the notice to vacate was technically insufficient. While the appeal was pending, plaintiffs in the instant action failed on

December 26, 1946, to pay the rent due for the apartment whereupon defendant obtained a writ of possession which was served on plaintiffs and on January 2, 1947, they were evicted from the apartment.

Upon reversal of the judgment of the municipal court plaintiffs instituted the present action seeking to recover damages for their wrongful eviction. After trial in the superior court the judge awarded a judgment in favor of plaintiffs in the sum of $1,797.

[1, 2] *Question: May a tenant who is evicted by virtue of a writ of possession under a judgment in an unlawful detainer action which judgment is subsequently reversed on appeal recover in a tort action for malicious prosecution in the absence of a showing of want of probable cause?*

No. The rule is accurately stated in Lawyers' Reports Annotated (1918 C), page 323 as follows:

"It is a general rule that the courts are open for the purpose of determining the existence of rights to which any person may conceive himself entitled. If a person brings an action in good faith and without malice, he is not liable beyond the costs that may be assessed against him in the action, however unfounded the action may be. It is only when he prosecutes an action maliciously and without probable cause that he renders himself liable in damages. Liability for the malicious prosecution of civil actions is sometimes limited to cases in which there has been an interference with the person or property. The present note is concerned with the question whether these general rules apply to and govern the liability of a landlord who has brought an unfounded suit against his tenant. A contract relation exists between a landlord and his tenant; the contract, that is, the lease, usually contains covenants. It may be stated generally at this point in the discussion that, if the action of the landlord amounts to a breach of his covenants, he renders himself liable therefor irrespectively of the existence of malice or lack of probable cause * * *"

[3] The present tort action instituted by plaintiffs was in the nature of an action for malicious prosecution. There is no such thing as a cause of action for unlawful or malicious eviction of a tenant. Where the eviction arises from the wrongful use of judicial processes the cause of action is one for malicious prosecution. (See Black v. Knight, 176 Cal. 722, 726, 169 P. 382, L.R.A. 1918C, 319.)

[4] To sustain a cause of action for malicious prosecution one of the essential elements is a finding of fact that there was a want of probable cause. (McPheeters v. Bateman, 11 Cal.App.2d 106, 108, 53 P.2d 195.)

The rule is established that in the absence of proof of fraud in obtaining a judgment in an unlawful detainer action, even though it be reversed on appeal, such judgment gives rise to a conclusive presumption of probable cause for the institution of the unlawful detainer action. (Black v. Knight, 44 Cal.App. 756, 770, 187 P. 89.)

[5] In the present case there was neither an allegation in the complaint nor a finding by the trial court that defendant instituted the action for unlawful detainer in the municipal court without a want of probable cause. On the contrary the undisputed evidence disclosed that a judgment had been entered in favor of plaintiff in the municipal court action (defendant here) and there was a total absence of any evidence that defendant perpetrated any fraud in the obtaining of such judgment. Therefore the aforementioned rule gave rise to the conclusive presumption that there was probable cause for the institution of such action.

Since plaintiffs have failed to prove one of the essential elements of their cause of action the judgment must be reversed. Therefore it becomes unnecessary to discuss other points argued by counsel.

Reversed.

MOORE, P. J., and WILSON, J., concur.

Hearing denied; CARTER, J., dissenting.

102 Cal.App.2d 696

PEOPLE v. CHAMBERS et al.

Cr. 4560.

District Court of Appeal, Second District,
Division 1, California.
March 7, 1951.

Robert W. Chambers and another were convicted in the Superior Court, Los Angeles County, William M. Byrne, J., of burglary in the second degree and grand theft, and the defendant Chambers alone appealed. The District Court of Appeal, Drapeau, J., held that the evidence sustained the conviction.

Affirmed.

1. Criminal law 🔑1144(13)

On appeal from judgment of conviction in criminal prosecution, appellate court must view evidence in light most favorable to respondent.

2. Burglary 🔑41(1)
Larceny 🔑65

Conviction of burglary and grand theft was sustained by evidence. Code Civ.Proc. § 1847.

3. Criminal law 🔑829(3)

In prosecution for burglary and grand theft, trial court did not err in refusing to give defendant's proposed instruction on question of identification where jurors were fairly and fully charged by court and instructions given were sufficient to advise jury on matter of identity.

◆

Paul E. Tapley, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen. and Doris Maier, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

By an information containing two counts, defendants were charged jointly with the crimes of burglary and grand theft, in that on April 6, 1950, they entered a warehouse with intent to commit theft and unlawfully took away over $200 worth of cigarettes.

The jury found them guilty as charged and the crime of burglary was fixed at second degree. Thereafter, defendant Chambers' application for probation was denied and he was sentenced to State's prison. He alone appeals from the ensuing judgment of conviction.

It is here contended that the evidence is legally insufficient to support the verdict on either count of the information, and that the trial court erred in its refusal to give appellant's proposed instruction on the question of identification.

[1] This court must view the evidence in the light most favorable to respondent. People v. Newland, 15 Cal.2d 678, 104 P.2d 778.

An examination of the record discloses that about eight o'clock in the morning of April 6, 1950, Mr. Yowell, a route salesman for the Coast Cigarette Vendors of 2818 South Hill Street, Los Angeles, loaded his car with a day's supply of cigarettes, approximately 4,000 packs. His car was parked on a loading platform located on a roof-covered driveway within the warehouse of the said vending company. After he finished loading the car he stepped into the office about 40 feet away. When he returned in about five minutes he discovered that four cases of cigarettes, containing about 2100 packages, were missing from his car.

About the same hour, Mrs. Margaret McMahon, who occupied a rear ground floor apartment in a building adjacent to the warehouse, noticed a blue two-door Buick coupe parked at an angle in 28th Street opposite her apartment. Her attention was first attracted to the car, she said, because it was illegally parked. She then observed appellant Chambers carry three cases of cigarettes, one at a time, from the direction of the warehouse to the car. One of these he placed in the "turtle," and as he did so, she saw another case therein. Defendant Carlson stood near the car and helped appellant place the case in the turtle and two more cases in the back of the car. While appellant was hurrying back and forth from the warehouse to the car, Mrs. McMahon wrote the license number of the car on a piece of paper. Before the men drove off, she saw defendant Carlson bend the license plates "so as to hide the number." Mrs. McMahon gave the license number to the salesman, Mr. Yowell, and described the men as two colored gentlemen, one tall and one short.

On April 12, 1950, while cruising around the same neighborhood in the same car, both men were apprehended. On that day Mrs. McMahon identified them at the University Police Station as the same men she saw putting cases of cigarettes in the Buick on April 6, 1950.

The defense produced the witness, Mr. Goodman, who testified that appellant's Buick had been brought into his garage for repairs, either on the evening of April 5th or the morning of April 6th. That the bill for the work showed that a water pump was installed for $50; that $2 was paid on April 6th, the balance payable within ten days. He further stated that the date on the bill "4-6-50" referred to the date when appellant "picked the car up and paid and also the date that the work was performed on it." To the question: "It could have been picked up on the morning of the 6th, could it?", the witness replied: "Could have." He had no recollection as to whether the car was towed in on the 5th or the 6th. On rebuttal, Police Officer Jensen testified that he had a conversation with Mr. Goodman at which time the latter told him that he did not remember when the car was taken out of the garage, either the 4th, 5th or 6th of April.

[2] It is readily apparent from the foregoing résumé that the verdicts and the judgment are sufficiently supported by the evidence. Mrs. McMahon, an eye-witness to the offenses charged, positively identified both defendant Carlson and appellant Chambers as the participants therein. Opposed to this, the testimony of Mr. Goodman is directed to the view that appellant's automobile was undergoing repairs at the time the crimes were committed.

The jury being the exclusive judges of the credibility of the witnesses (Code of Civil Procedure § 1847), and of the effect and value of the evidence addressed to them were justified in resolving the question of identity against the contentions of appellant.

[3] The trial court did not err in its refusal to give the following instruction:

"The Court instructs the Jury, so far as the identity of the defendants is concerned, that if you believe from the evidence and the circumstances prove that there is a reasonable doubt whether the prosecuting witness might not be mistaken as to the identity of the defendant, then the Jury would not be authorized to find the defendant guilty of the offenses charged."

The jurors in the instant cause were fairly and fully instructed. The instructions included charges regarding the credibility of witnesses; the weight to be accorded conflicting testimony; the meaning and methods of impeachment, the presumption of innocence, reasonable doubt, and burden of proof. They were given definitions of burglary, theft, principals, and in addition they were instructed as follows:

"When one who was not at the place where a crime was committed at the time of its commission is later charged with having been present and having committed or taken part in committing such a crime, his absence from the scene of the crime, if proved, is a complete defense that we call an alibi.

"Each of the defendants in this case has introduced evidence tending to prove that he was not present at the time and place of the commission of the alleged offense, for which he is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt whether or not a defendant was present at the time the crime was committed, he is entitled to an acquittal."

These instructions were sufficient to advise the jury on the matter of identity. It should not be overlooked that this is not a conviction which has its basis in circumstantial evidence, but is one based on the testimony of an eye-witness.

For the reasons stated, the judgment appealed from is affirmed.

WHITE, P. J., and HANSON, Justice pro tem., concur.

102 Cal.App.2d 655

PEOPLE v. HIDEN.

Cr. 4501.

District Court of Appeal, Second District,
Division 1, California.
March 6, 1951.

Henry G. Hiden was convicted in the Superior Court of Los Angeles County, David Coleman, J., of grand theft, and defendant appealed. The District Court of Appeal, Drapeau, J., held that the evidence was sufficient to sustain the conviction.

Affirmed.

1. Indictment and information ⚷4

Nothing in the federal Constitution or the state Constitution denies to the state the right to prosecute criminal cases by an information.

2. Larceny ⚷65

Evidence sustained conviction for grand theft. Pen.Code, § 484.

3. Criminal law ⚷1167(4)

In grand theft prosecution, no prejudice to the defendant appeared from the amendment to the information at the close of the state's case, adding two new counts to the information in addition to the four for which defendant was being tried, especially since the jury acquitted defendant of the two counts added to the information. Pen.Code, §§ 954, 1008.

4. Criminal law ⚷762(5)

In grand theft prosecution, an instruction that the offense set forth in count five of the information was different from the same offense as set forth in third count and that the defendant could only be guilty on one of the counts, was proper, and did not imply that jury should return a verdict of guilty of either one or other of the counts. Pen.Code, § 484.

* * *

George E. Toner, Los Angeles, for appellant.

Henry G. Hiden, in pro. per.

Fred N. Howser, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

DRAPEAU Justice.

In 1942 defendant was in the throes of inventing an attachment for a piano, which he called "Music-in-Color." The attachment was to project colors upon a screen, or upon the walls of a room. These colors would change with musical notes, as keys of a piano were struck.

Defendant met the complaining witness at the home of a mutual friend. He talked about no other subject than his invention; he was impecunious, and needed money to bring his brain child into the world.

The complaining witness was an elderly woman, whose husband and whose son were dead. She was trustee and executrix of the son's estate, for the benefit of her grandchildren. She had control of funds in the estate, and she had money of her own. She lived in San Francisco; defendant lived in Los Angeles. Many of the communications between defendant and the lady were by telephone between the two cities.

Defendant and the complaining witness made a verbal agreement. He was to perfect the invention; she was to finance him. When "Music-in-Color" became a financial success, she was to get back her money from the first profits; then she was to have one-half of the profits as they were to bourgeon through the years.

She first advanced defendant $3,000, to buy a piano. Later, she advanced him money from time to time as he told her he needed it. But no profits ever materialized.

In 1946 defendant found an old movie studio in Hollywood. He thought it would be just the place in which to demonstrate "Music-in-Color." The complaining witness came to Los Angeles from San Francisco to see the studio. And she thought so, too.

So they agreed, again verbally, to purchase the studio for $27,500. Deed was to be in her name. The lady furnished the money, partly from her own funds, and partly from money belonging to her deceased son's estate.

Then defendant found two vacant lots. He and the complaining witness thought they would be useful in conjunction with the studio. So, again verbally, they agreed to purchase the lots, the deed to be in the lady's name. Again the lady furnished the money, $12,500, partly from her own funds and partly from her son's estate.

Defendant took care of all of the details of these two purchases. He arranged for the escrows, and directed what was to be done. All the complaining witness did was to furnish the money, come to Los Angeles occasionally, and talk with defendant long-distance from time to time.

Then came the things which caused defendant to be charged with grand theft. Instead of having the deeds made in the name of the complaining witness, he caused title to be vested in him. Then he furnished a financial statement to a bank, representing that he owned the real estate, unencumbered. On the strength of this statement he established credit, and borrowed money from the bank on open notes—$1,000 at one time and $2,000 at another.

Defendant also borrowed money on the real property, giving notes secured by trust deeds to secure the loans.

When the complaining witness discovered what had been done, she had to pay off the trust deeds to save what was left of her money. This cost her approximately $14,000. In passing, it is to be said that she reimbursed her son's estate for the money, she had taken out of it.

The bank lost most of the money it had loaned on the open notes.

Defendant was convicted by a jury of four counts of grand theft. Two of these counts involved the transactions with the bank, and two were for theft of the real property.

At the close of the People's case the Court, on motion of the district attorney, reopened the case, and permitted an amendment to the information. The amendment added counts five and six, and charged defendant with taking the money—$27,500 and $12,500—rather than the real property described in counts four and five. Defendant was found not guilty of these two last counts. Also he admitted an old prior conviction and imprisonment for grand larceny (auto).

Defendant has filed briefs *in propria personam.* Counsel appeared at the request of this Court, and argued for defendant.

Defendant testified to a plausible account of his relations with the complaining witness. Unfortunately for him, the jury did not believe him.

He said that the agreement was made substantially as she said it was; that she made advancements to him to perfect his invention; that she knew at all times that he had taken title to the real property in his name, to facilitate getting repairs and improvements made, when he was to deed it to her; that she knew he had established the credit with the bank and had mortgaged the real property; and that she knew he spent all of the money thus secured to perfect the invention, to remodel the old studio, and for his own personal expenses during the years. Also that when he borrowed the money from the bank, he told the president of the bank all about his agreement with the complaining witness, and explained why title to the real estate was in his name, but that the president decided to lend him the money anyway.

He further testified that he built a successful "Music-in-Color," and demonstrated it before a prominent woman's club, and educational authorities in southern California.

Defendant's contentions on appeal are as follows:

(1) It was error to try him upon a charge presented by information. Under constitutional law he could only have been charged by indictment.

(2) It was error to permit the district attorney to add, at the close of the People's case, two new counts to the information, in addition to the four for which he was being tried.

(3) The evidence was insufficient to support defendant's conviction upon counts one and two.

(4) The evidence does not support defendant's conviction on counts three and four.

(5) The convictions on counts one and two are inconsistent with the convictions upon counts three and four.

(6) The convictions on counts three and four are inconsistent with the acquittals on counts five and six.

(7) Error in instructions given.

[1] Defendant's first contention that his prosecution by information was contrary to constitutional guaranty of due process of law has been made many times in California. No necessity appears for any detailed exposition of the law. Nothing in the federal constitution or the constitution of California denies to this state the right to prosecute criminal cases by information. Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782; Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 292, 28 L.Ed. 232; People v. Raffington, 98 Cal.App.2d 455, 220 P.2d 967.

Defendant's contentions of insufficiency of the evidence to support the counts of the information are answered if a theory of theft which will meet the test of reasonable doubt may be drawn from the evidence.

Penal Code, § 484, now amalgamates the crimes of larceny, embezzlement, false pretenses, and kindred crimes under the cognomen of theft. People v. Myers, 206 Cal. 480, 275 P. 219; People v. Cannon, 77 Cal. App.2d 678, 176 P.2d 409. Like charity, California's definition covers a multitude of sins. No longer need the legal profession puzzle over fine distinctions between embezzlement, larceny, and other elements of stealing. The crime is complete if a man takes property not his own, with intent to take it.

This section of the Penal Code makes it a crime for any person "by any false or fraudulent representation or pretense" to "defraud any other person", and to "fraudulently appropriate property which has been entrusted to him".

[2] The evidence establishes beyond a reasonable doubt that when defendant represented to the bank that he owned the real property, and thereby secured credit upon which he borrowed money he could never repay, he was guilty of theft.

The evidence also establishes that when defendant mortgaged real property which he did not own, and kept the money, again he was guilty of theft.

[3] No prejudice to defendant appears from the amendment to the information, either at the time, or in the manner in which it was made. Penal Code, §§ 954, 1008. The amendment did not change the offense charged, nor charge an offense not shown on the preliminary examination. Following the theory adopted by the jury, defendant was quite properly acquitted of the two counts added to the information. Therefore, no inconsistencies appear in the acquittal upon these two last counts. And the section, Pen.Code, § 1008, does not abridge any constitutional rights of defendants in criminal cases. People v. Roth, 137 Cal.App. 592, 31 P.2d 813.

Defendant presents two final contentions of error in instructions.

[4] First he alleges error based upon the following instructions:

"You are instructed that the offense set forth in Count V is a different statement of the same offense as set forth in Count III of the information and if you find the defendant guilty on one of these counts, you must find him not guilty of the other.

"Likewise, Count VI is a different statement of the same offense as set forth in Count IV of the information, and if you find the defendant guilty of one of these counts, you must find him not guilty of the other."

The jury was properly instructed that they could not find defendant guilty of both charges. Nothing was stated or implied which required a verdict of guilty of either or of any offense charged.

Secondly, defendant alleges error in instructions relative to embezzlement and other elements of theft. In the circumstances of the case, the instructions relative to crimes embraced in the statute were proper. Indeed, a review of all the instructions demonstrates a fair and impartial presentment to the jury of the law applicable to the case.

The judgments are affirmed.

WHITE, P. J., and HANSON, Justice, pro tem.

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102 Cal.App.2d 622

TONCRAY v. SUPERIOR COURT OF LOS ANGELES COUNTY.

Civ. No. 18305.

District Court of Appeal, Second District, Division 1, California.

March 5, 1951.

Proceedings by Leo E. Toncray for a writ of prohibition to restrain the Superior Court of the State of California, in and for the County of Los Angeles, from proceeding with a criminal case. The District Court of Appeal, Doran, J., held that the record did not present a situation entitling the petitioner to a writ of prohibition restraining the proceedings.

Order in accordance with opinion.

Prohibition 🔑11

Handwriting expert's admission that he could not say that some person wrote samples executed by defendant and exhibits on strength of which defendant was held to answer after preliminary examination, did not so conclusively show lack of reasonable cause for the charge as to warrant issuance of prohibition. Pen.Code, § 995.

Russell E. Parsons, Los Angeles, for petitioner.

W. E. Simpson, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty., and Ralph F. Bagley, Deputy Dist. Atty., all of Los Angeles, for respondent.

DORAN, Justice.

Petitioner was charged with several violations relating to bookmaking and, following a preliminary examination, was held to answer. A motion was made in the superior court to set aside and dismiss the information on the grounds that the committing magistrate "exceeded his authority in holding your Petitioner to answer for the charges set forth in the information, and the defendant was committed without reasonable or probable cause". The motion was denied, whereupon this petition for a writ of prohibition was filed.

It is contended that the "Superior Court exceeded its authority in denying the motion pursuant to Section 995 of the Penal Code, and the information is therefore void and invalid and the Respondent Superior Court is without jurisdiction to proceed against your petitioner".

The principal evidence appears to have been certain handwriting in connection with which a police officer whose qualifications as a handwriting expert was stipulated, testified that the exhibits were written by "one and the same person". On cross-examination the defendant executed several examples in the presence of the expert. And as related in defendant's petition, "These handwritings by Toncray were then submitted to the handwriting expert and after some time spent in examining the handwriting on Exhibit '1' and the disputed handwriting, the expert said this: 'Well, counsel, I must say this, that looking at the Defendant's 1 for identification with the questioned writing that appears on People's B, I couldn't honestly say that one and the same person wrote them' ". It is argued that this last mentioned testimony definitely disproved and overthrew the charges against the defendant.

Respondent argues on the contrary that such testimony merely presents a conflict in the evidence and that, on the whole, the evidence is sufficient to establish "reasonable or probable cause which may exist although there may be some room for doubt."

Petitioner relies on Greenberg v. Superior Court, 19 Cal.2d 319, 321, 121 P.2d 713, 715. However, the Greenberg case presents a rather unusual situation. There the defendant was indicted when, "the transcript of the testimony upon which the indictment was based contains no evidence even remotely supporting the charges against petitioner". The court held that in such circumstances the writ of prohibition is a proper remedy for "A grand jury that indicts a person when no evidence has been presented to connect him with the commission of the crime charged, exceeds the authority conferred upon it by the Constitution * * *". Although petitioner's contention is not without merit and the evidence is slight nevertheless, the record does not present a situation where, under the authorities, a writ of prohibition affords the remedy contended for by petitioner.

The Alternative Writ heretofore issued is discharged and the peremptory writ prayed for is denied.

WHITE, P. J., and DRAPEAU, J., concur.

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102 Cal.App.2d 635

In re HORN'S ESTATE.

SLOSBERG et al. v. HORN (two cases).

Civ. 17997.

District Court of Appeal, Second District, Division 3, California.

March 5, 1951.

Hearing Denied April 30, 1951.

Proceeding in the matter of the estate of Regina L. Horn, deceased, wherein Pauline L. Slosberg and Joseph Lachs, heirs of decedent petitioned that a citation issue ordering Henry Horn, the administrator of decedent's estate, to show cause why he should not inventory and account for certain property. The Superior Court of Los Angeles County, John Gee Clark, J., entered an order that defendant Horn was to inventory certain items as assets of the estate of decedent and as separate property of decedent and all parties appealed from the order. The District Court of Appeal, Vallee, J., held that evidence was sufficient to support finding that jewelry, furs, and $1000 loan were decedent's separate property.

Order affirmed.

1. Joint tenancy 🔑1
Tenancy in common 🔑1

A joint tenancy and a tenancy in common are separate and distinct estates and are not in anywise interdependent. Civ. Code, §§ 683, 685.

2. Joint tenancy 🔑1

In order that a joint tenancy be lawfully created, it is necessary that there be the four unities of interest, title, time, and possession. Civ.Code, § 683.

3. Joint tenancy 🔑6

The distinguishing incident of a joint tenancy is a right of survivorship. Civ. Code, § 683.

4. Tenancy in common 🔑1

A tenancy in common requires for its existence one unity, that of possession. Civ. Code, § 685.

5. Husband and wife 🔑14(4)

In a tenancy in common between husband and wife, each is vested with an undivided interest in property. Civ.Code, § 685.

6. Joint tenancy 🔑3

A joint tenancy may be created only by a written transfer, instrument or agreement. Civ.Code, § 683

7. Frauds, statute of 🔑125(1)

An oral agreement within a statute requiring a writing is not a contract and cannot generally furnish basis for an action for enforcement of its terms.

8. Frauds, statute of 🔑56(7), 124

Alleged parol agreement between husband and wife to create a joint tenancy with right of survivorship as to party's property was a nullity and title did not pass from one to the other and neither husband nor wife was divested or vested with title to property of other and purported agreement could not be construed as creating tenancy in common. Civ.Code, §§ 683, 685.

9. Frauds, statute of 🔑125(1)

The law will not make valid without a writing that which law requires to be in writing.

10. Tenancy in common 🔑3

Statute providing that every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, or unless acquired as community property, means that if an estate is conveyed or transferred and it is not expressly declared in conveyance or transfer to be an estate in joint tenancy, or in partnership for partnership purposes, or unless acquired as community property, it will be held by grantees or transferees as tenants in common. Civ.Code, § 686.

11. Executors and administrators 🔑314(1)

A proceeding for distribution is a proper one for determination of questions of title to properties in which decedent had an interest and which are claimed by the administrator as his own adversely to estate.

12. Executors and administrators 🔑85(9)

On petition of heirs of decedent to require decedent's husband as her administrator to inventory and account for certain property, trial court's refusal to determine ownership of decedent's property was proper, since proceeding for distribution was proper proceeding for that determination.

13. Property 🔑9

The law presumes that things which a person possesses are owned by her. Code Civ.Proc. § 1963, subds. 11, 12.

14. Husband and wife 🔑49½(7)

If a husband transfers his separate or community property to his wife, mere fact of transfer raises prima facie presumption that husband intended transfer to be a gift.

15. Husband and wife 🔑49½(8)

On petition to obtain order requiring administrator to show cause why he should not inventory and account for certain property as his deceased wife's estate, presumption that a transfer of husband's separate community property to wife was intended to be a gift together with other evidence sustained finding that jewelry and furs were gifts from husband to decedent.

16. Executors and administrators 🔑85(9)

Where wife's jewelry was not in joint tenancy safety deposit box rented by parties at time of her death, in view of fact that only persons who could successfully contradict husband's testimony that jewelry ever had been placed in box was dead, probate court was justified in considering husband's uncorroborated testimony as weak and unsatisfactory and, in view of other evidence, insufficient to establish his claim.

17. Husband and wife 🔑133(1)

In proceeding to obtain order directing administrator to show cause why he should not inventory or account for certain property which allegedly belonged to his deceased wife, evidence sustained finding that jewelry, furs and $1000 loan made by deceased wife to husband were deceased wife's separate property.

* * *

Don Marlin, William H. Levit, and Richard H. Millen, all of Los Angeles, for appellants and respondents Pauline Lachs Slosberg and Joseph Lachs.

Fred Horowitz, Abraham Gottfried and Alvin F. Howard, all of Los Angeles, for cross-appellant and respondent Henry Horn.

VALLÉE, Justice.

Appeals from an order of the probate court requiring and directing an administrator to inventory property.

Decedent, Regina L. Horn, and Henry Horn (referred to as citee) were married May 4, 1943. Decedent was suffering from incurable cancer which was known to citee but not to decedent. At that time citee had a separate estate of several hundred thousand dollars, and decedent an automobile, a mink coat, some jewelry, some stocks, and a pension of about $100 a month. Mrs. Horn died intestate May 14, 1947. Citee was appointed administrator of her estate.

In the course of probate of the estate, on application of Pauline Lachs Slosberg, sister, and Joseph Lachs, brother, heirs of the decedent (referred to as petitioners), a citation issued ordering the administrator to show cause why he should not inventory and account for certain property. At the hearing petitioners introduced evidence only as to certain items of jewelry, furs, and an alleged $1000 loan from decedent to citee.

The court found that three items of jewelry, not inventoried, were owned by decedent as her separate property at the time of her marriage to citee and that they remained her separate property to the time of her death. It was also found that six items of jewelry, a gold cigarette case, two fur coats, and a fur scarf, not inventoried, were given to decedent by citee with the intention that each should constitute a gift "and should thereupon become and remain and did thereupon become and remain the separate property of decedent" to the time of her death, and that a $1000 loan from decedent to citee was her separate property. Citee was ordered to inventory all of these items as assets of the estate and as the separate property of decedent. All parties appealed from the order.

Appeal of Petitioners.

Petitioners claim that the court erred in not ordering citee to inventory as assets of the estate one-half of all property of decedent and citee owned by them at the date of her death because, so they say, decedent and citee owned it as tenants in common. Petitioners' claim is based on the following occurrences at the hearing. At the time petitioners rested, citee asked the court to discharge the citation as to all property listed in the affidavit for the citation as to which no evidence had been introduced by petitioners. The judge stated that he would not discharge citee "until the final judgment," but that the only items which were in issue were those as to which petitioners had introduced evidence and that "unless you [citee] go ahead voluntarily and put in some testimony of your own that you are liable for more, you won't have to account for more than that in any event." In his opposition to the citation, citee testified that about two weeks after their marriage an oral agreement was made between decedent and himself whereby all property then owned and thereafter acquired by each of them would be held by them in joint tenancy and that the agreement had not been modified. On the completion of citee's testimony, upon request of counsel for petitioners, the issues were enlarged to include ownership of all the property of decedent and citee at the time of the death of decedent. The court found that "there was no agreement between citee and decedent creating a joint tenancy or a community property interest as to all of their property."

Petitioners say that the testimony of citee was not controverted nor inherently improbable; that he is bound thereby; that the court was compelled to believe his testimony; that since the agreement failed because it was not in writing, a tenancy in common resulted, and he should have been required to inventory one-half of all property owned by himself and his wife at the time of her death. We have concluded that petitioners' claim cannot be sustained.

[1-9] We need not decide whether the court was compelled to believe the testimony of citee as to the agreement. Assuming for the purpose of this opinion only that the court was obliged to believe his testimony and that decedent and citee intended to create a joint tenancy with right of survivorship, it does not follow that a tenancy in common was created by reason of the failure of a joint tenancy. A joint tenancy (Civ.Code, § 683) and a tenancy in common (Civ.Code, § 685) are separate and distinct estates and are not in anywise interdependent. Siberell v. Siberell, 214 Cal. 767, 770, 7 P.2d 1003. In order that a joint tenancy be lawfully created, it is necessary that there be the four unities of interest, title, time, and possession. The distinguishing incident of a joint tenancy is a right of survivorship. Id., 214 Cal. 771, 7 P.2d 1003. A tenancy in common requires for its existence but one unity, that of possession. Wood v. Henley, 88 Cal.App. 441, 452, 263 P. 870. In a tenancy in common between husband and wife, each is vested with an undivided interest in the property. Meyer v. Superior Court, 200 Cal. 776, 792,

254 P. 1108. A joint tenancy may be created only " 'by a written transfer, instrument or agreement'." California Trust Co. v. Bennett, 33 Cal.2d 694, 697, 204 P.2d 324, 326. An oral agreement within a statute requiring a writing is not a contract. It cannot as a general rule furnish the basis for an action for enforcement of its terms. Fuller v. Reed, 38 Cal. 99, 109; Borderre v. Den, 106 Cal. 594, 600, 39 P. 946; Vasik v. Speese, 26 Cal.App. 129, 130, 146 P. 61; Matheron v. Ramina Corp., 49 Cal.App. 690, 695, 194 P. 86; 37 C.J.S., Frauds, Statute of, § 224, page 724, 49 Am.Jur. 830, § 532. The oral agreement is unenforcible. O'Brien v. O'Brien, 197 Cal. 577, 586, 241 P. 861. The law will not make valid without a writing that which the law requires to be in writing. The agreement was a nullity. Title did not pass from one to the other. Neither husband nor wife was divested of, or vested with, title to the property of the other. The purported agreement cannot be construed as creating a tenancy in common. The intention was to create a tenancy with survivorship. A tenancy in common was expressly negatived. To construe the purported agreement as conveying or transferring to tenants in common would be a judicial conveyance or transfer of the individual property of the parties in legal effect contrary to their expressed intention.

In support of their contention in this behalf petitioners rely on In re Estate of Harris, 169 Cal. 725, 147 P. 967; In re Estate of Harris, 9 Cal.2d 649, 72 P.2d 873, and Wheeland v. Rodgers, 20 Cal.2d 218, 124 P.2d 816. No one of these cases is in point. In the first Harris case it was held that joint tenancy property may be traced into personal property, and the personal property so acquired with joint tenancy funds will be deemed to be held in joint tenancy in the absence of an agreement to the contrary regardless of the circumstance that title to the after-acquired property may be held by only one of the joint tenants. In the second Harris case it was held that if a *valid* joint tenancy is created between spouses and the husband severs his joint tenancy ownership by taking property purchased with the joint tenancy funds in his name, the spouses thereafter own the property as tenants in common, the husband holding the legal title to a one-half interest in trust for his wife. The Wheeland case held that prior to the enactment of section 15a of the Bank Act (Stats. 1909, p. 87 as amended by Stats. 1921, p. 1367; 1 Deering's Gen. Laws, Act 652), which provides that the making of a bank deposit in the form of a joint tenancy account with the right of survivorship shall be conclusive evidence of the intention of the depositors to vest title in the survivor, the creation by a husband of a joint tenancy bank account merely gave rise to a presumption of a gift to his wife which could be overcome by evidence that no gift was made and that the wife did not become vested with any title. These cases have no application because in the present case a valid joint tenancy was not created.

[10] Petitioners argue that a tenancy in common resulted because of the provisions of section 686 of the Civil Code. The section reads: "Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in section six hundred and eighty-three, or unless acquired as community property." Section 686 means that if an estate is conveyed or transferred and it is not expressly declared in the conveyance or transfer to be an estate in joint tenancy, or in partnership for partnership purposes, or unless acquired as community property, it will be held by the grantees or transferees as tenants in common. Bowen v. May, 12 Cal. 348, 351; In re Estate of Hittell, 141 Cal. 432, 435, 75 P. 53; Dalton v. Keers, 213 Cal. 204, 207, 2 P.2d 355. Obviously section 686 does not have the effect of creating a tenancy in common in a case such as the present where it was expressly declared in the attempted transfer to be a joint tenancy.

[11, 12] Prior to the issuance of the order to show cause, citee had inventoried certain personal property of the decedent. Petitioners claim the court erred in not

finding the ownership of the previously inventoried property. There was no error. The court, no doubt, will determine this question on the hearing of the petition for distribution on file which alleges that this property is community property, and the exceptions thereto which allege that it is separate property of decedent and not community property. A proceeding for distribution is a proper one for the determination of questions of title to properties in which the decedent had an interest and which are claimed by the administrator as his own adversely to the estate. In re Estate of Basso, 68 Cal.App.2d 294, 299, 156 P.2d 476; In re Estate of Gillett, 73 Cal.App.2d 588, 600, 166 P.2d 870.

Appeal of Citee.

[13–15] Citee claims the findings that the jewelry, furs, and the $1000 loan were decedent's separate property are not supported by the evidence. The claim is without merit. Three of the items of jewelry were a cocktail ring, a gold and cloisonné watch, and a charm bracelet. There was evidence that these items were given to decedent by her sister or mother prior to her marriage. There was evidence that the other items of jewelry were given and delivered to decedent by citee as gifts; that they were in her possession and used from the time she received them until her death; that the gold cigarette case bore her initials; one ring was her engagement ring, one a platinum wedding band; one was a birthday and Christmas present; one of the furs was a mink coat given to decedent by citee as a birthday and anniversary gift which she had in her possession with the name "Regina L. Horn" embroidered in the lining; another fur was a sable scarf which citee gave decedent as a going-away present when he went to Europe and left her at home; the other fur was a Persian lamb coat which decedent had in her possession with the initials "R.L.H." on the coat. The law presumes that things which a person possesses are owned by her. (Code Civ.Proc. § 1963, subds. 11 & 12.) If a husband transfers his separate or community property to his wife, the mere fact of transfer raises the prima facie presumption that he intended the transfer to be a gift. Dunn v. Mullan, 211 Cal. 583, 589, 296 P. 604, 77 A.L.R. 1015; Ballinger v. Ballinger, 9 Cal.2d 330, 333, 70 P.2d 629; Ayoob v. Ayoob, 74 Cal.App.2d 236, 254, 168 P.2d 462; Pasadena Trust & Savings Bank v. Bryson, 46 Cal.App. 730, 733, 189 P. 816. The presumption, together with the other evidence, was sufficient to warrant the conclusion that the jewelry and furs were gifts from citee to decedent.

In his closing brief, citee in effect concedes that he gave the jewelry to decedent during her lifetime but contends that the title was changed from her separate property to joint tenancy property by deposit in a joint tenancy safe deposit box.

On May 21, 1943, decedent and citee rented a safe deposit box and signed and delivered to a bank a co-renter agreement which read: "We * * * hereby declare and represent that we own, as joint tenants, with the right of survivorship, all of the property of every kind or character now within said box, and that all property which may be deposited therein by either or any of us shall be and is owned by us as such joint tenants." Citee argues that the jewelry was placed in the safe deposit box; that it thereby became joint tenancy property; that although it was removed by decedent in her lifetime and was not in the box at the time of her death, it did not lose its character as joint tenancy property.

[16] While citee testified that each item of jewelry was in the box at one time or another after it was given to decedent and during her lifetime, there was evidence from which the court reasonably could infer that each item was at all times in the possession of decedent and that no one of the items was ever in the safe deposit box. The jewelry was not in the box at the time of decedent's death. It is apparent that the probate court did not deem the testimony of citee sufficient to establish that the jewelry ever had been placed in the box and found against him. In view of the fact that the only person who could successfully contradict his testimony was dead, the court was justified in considering his uncorroborated testimony as weak and unsatisfactory

and, in view of the other evidence, insufficient to establish his claim. Olson v. Olson, 4 Cal.2d 434, 437, 49 P.2d 827; Khoury v. Barham, 85 Cal.App.2d 202, 211, 192 P.2d 823.

[17] The court found that "On or about April 18, 1947, citee borrowed the sum of $1000 from decedent; that said loan has never been repaid by citee to decedent and the same was due and owing from citee to decedent at the time of decedent's death; that said loan of $1000 was the separate property of decedent at the time of her death and was not the community property of citee and decedent." On April 18, 1947, decedent drew a check for $1000 on a bank account in favor of citee. The account was in her name alone. Apparently it was made up of decedent's separate funds and money given her by citee for household and other expenses. The check had the word "loan" written on it in the handwriting of decedent. Citee cashed the check, received the $1000 and did not return it. He admitted that on previous occasions he had received checks from decedent drawn on this account and had returned the money. When asked if he had paid the $1000 "back to her," he answered, "No, I didn't have a chance." The evidence is sufficient to support the findings that the jewelry, furs, and the $1000 loan were decedent's separate property.

Order affirmed. The parties will bear their own costs on appeal.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; GIBSON, C. J., dissenting.

102 Cal.App.2d Supp. 952

COOLEY et al. v. BRENNAN et al.

C. A. 162008.

Appellate Department, Superior Court,
San Diego County, California.
Feb. 15, 1951.

Proceeding by S. R. Cooley and another against Roy C. Brennan for enforcement of a judgment by execution, wherein Jeanne M. Brennan filed a third party claim. From a judgment of the Municipal Court, City of San Diego, Ronald Abernethy, J., in favor of the third party claimant, the plaintiffs appealed. The Superior Court of San Diego County, Burch, J., held that an agreement for transfer of grocery merchandise from defendant to his wife without compliance with the Bulk Sales Law was void, but that approval of the agreement by interlocutory and final divorce decrees brought transfer within exception of the Bulk Sales Law, and that the transfer was good as against defendant's judgment creditors.

Judgment affirmed.

1. Fraudulent conveyances 🔑**172(1), 181(1)**

Transfer of grocery merchandise by husband to wife without compliance with notice requirements of Bulk Sales Law was void as to creditors, but contract was binding between the parties. Civ.Code, § 3440.

2. Fraudulent conveyances 🔑**47**

Where property settlement by which husband agreed to convey grocery merchandise to wife without compliance with Bulk Sales Law, was subsequently approved by interlocutory and final divorce decrees, the transfer became one by direction of a court of competent jurisdiction within exception of Bulk Sales Law, and was good as against husband's judgment creditors. Civ.Code, § 3440.

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Ruel Liggett, Roy M. Cleator and E. C. Davis, Ruel Liggett, San Diego, for appellants.

Clarence Harden, San Diego, for respondent.

BURCH, Judge.

Proceedings had in the court below upon a third party claim resulted in a judgment in favor of the third party claimant, Mrs. Brennan. Mrs. Brennan makes her claim to the property as against her former husband, Roy C. Brennan, and his creditors by reason of a property settlement agreement of October 5, 1948, by the interlocutory divorce decree of January 21, 1949, and by the final decree of February 20, 1950. The interlocutory decree "approved" the property settlement agreement, and directed that "each party shall perform all obligations of that party under said property settlement agreement". The final decree provided "wherein said interlocutory decree relates to the property of the parties hereto, said property be and the same is hereby assigned in accordance with the terms thereof to the parties therein declared to be entitled thereto".

On April 3, 1950, plaintiffs, as judgment creditors of Roy C. Brennan, procured an order to the clerk of the municipal court to issue execution on a judgment after five years from entry thereof, and the property here involved was duly levied on under this execution but was released upon the filing of the petition for hearing to determine title under third party claim.

Plaintiffs, as judgment creditors, claim that as to them neither the property settlement agreement of October, 1948, nor the subsequent divorce decrees affected their right.

The property was merchandise stock in a grocery business which the husband agreed to convey to the wife without complying with the requirements of notice by recording and publication, as exacted by Section 3440 of the Civil Code.

[1,2] By the very terms of the statute, as to the creditors, the agreement is void. The plaintiffs choose thus to treat it and are within their rights in so doing. But the contract was binding between the parties, Ramirez v. Hartford Accident & Indemnity Co., 29 Cal.App.2d 193, 84 P.2d 172 and, therefore, when the court approved it and directed and ordered in the interlocutory decree that its terms be carried out, it became an executed contract by virtue of the direction and order of the court. Thus both the interlocutory decree and the final decree, insofar as the creditors were concerned, controlled the transfer of the property between the debtor and his wife, who is the third party claimant. While the agreement had no effect upon the creditors' rights, the interlocutory and final decree operating upon the agreement established the separate right of the wife. See 550 Park Avenue Corp. v. Kuhe, 5 Cal.2d 182, 184, 53 P.2d 751; see by analogy Harris v. Commissioner, 1950, 340 U.S. 106, 71 S.Ct. 181, 95 L.Ed. 111.

Under these circumstances we are constrained to hold with the court below that the transfer was, at least as to the creditors, one made by direction and order of "a court of competent jurisdiction", and thus within the exception of Section 3440 of the Civil Code.

The judgment is affirmed.

TURRENTINE, P. J., and GLEN, J. concur.

36 Cal.2d 768

PEOPLE v. CARMEN.

Cr. 5152.

Supreme Court of California, in Bank.
March 1, 1951.

Rehearing Denied March 29, 1951.

Rayna Tom Carmen was convicted in the Superior Court, Madera County, Stanley Murray, J., of first degree murder and assault with intent to commit murder and from the judgment of conviction and order denying a new trial he appealed. The Supreme Court, Carter, J., held that the evidence sustained conviction of assault with intent to commit murder, but that the evidence on murder charge raised an issue as to involuntary manslaughter and that refusal to instruct as to manslaughter was error requiring reversal of murder conviction.

Judgment and order denying a new trial on first degree murder charge reversed and judgment and order denying a new trial on charge of assault with intent to commit murder affirmed.

Spence, Shenk, and Edwards, JJ., dissented in part.

1. Criminal law 🔑1020

Appeal from judgment imposing death penalty for first degree murder and imprisonment for assault with intent to commit murder and from order denying a new trial came automatically to Supreme Court.

2. Homicide 🔑253(1)

Evidence was sufficient to support conviction of first degree murder.

3. Criminal law 🔑814(1)

The issues in a criminal case are determined by the evidence and instructions to the jury must be responsive to the issues. Pen. Code, § 1127.

4. Homicide 🔑309(4), 341

Evidence that defendant fired rifle at automobile occupied by decedent and others without intending to injury or kill anyone and that he fired merely to frighten raised an issue as to involuntary manslaughter and refusal to give any instruction as to manslaughter, though requested by both defendant and the people, was error requiring reversal of conviction of first degree murder. Pen. Code, §§ 192, subd. 2, 417, 1127.

5. Criminal law 🔑770(2)

Defendant is entitled to instructions on his theory of the case as disclosed by the evidence, no matter how weak. Pen. Code, § 1127.

6. Criminal law 🔑814(2)

Trial court should instruct jury upon every material question upon which there is any evidence deserving of any consideration whatever and the fact that the evidence may not be of a character to inspire belief does not authorize refusal of an instruction based thereon. Pen. Code, § 1127.

7. Criminal law 🔑741(1)

The credibility of testimony is a question within the exclusive province of the jury. Pen. Code, § 1127.

8. Criminal law 🔑770(2)

Defendant is entitled to an instruction based upon the hypothesis that his testimony is entirely true, however incredible such testimony may be. Pen. Code, § 1127.

9. Criminal law 🔑795(1)

Trial court must instruct jury in regard to any included offense which the evidence tends to prove.

10. Criminal law 🔑795(2), 1173(2)

Where there is any evidence from which a reasonable inference may be drawn that the crime of which defendant was convicted was of a lesser degree, withdrawing such evidence from the consideration of jury and confining instructions to the crime charged is prejudicial error. Pen. Code, § 1127.

11. Homicide 🔑309(4), 341

Refusing a manslaughter instruction in a case where murder is charged and the evidence would warrant a conviction of manslaughter is reversible error. Pen. Code, §§ 192, subd. 2, 1127.

12. Homicide 🔑255(2)

Evidence that defendant fired rifle to frighten decedent and another, but did not aim at them and had no intention of killing or injuring anyone would warrant conviction of involuntary manslaughter. Pen. Code, §§ 192, subd. 2, 240, 245, 417.

13. Assault and battery ⚷48, 56
Criminal law ⚷27

Firing rifle to frighten decedent and another without aiming at them and without intending to kill or injure anyone, though unlawful, would not amount to a felony and would fall short of offense of assault with a deadly weapon or even assault. Pen. Code, §§ 192, subd. 2, 240, 245, 417.

14. Assault and battery ⚷56

"Assault with a deadly weapon" is merely an assault in which either a deadly weapon or any means of force likely to produce great bodily injury are used. Pen. Code, § 245.

See publication Words and Phrases, for other judicial constructions and definitions of "Assault with a Deadly Weapon".

15. Assault and battery ⚷49, 82, 95

In prosecution for assault, the intent need not be specific, that is, to cause any particular injury, and such intent may be implied from the act, but the intent is a question for jury. Pen. Code, §§ 240, 245.

16. Homicide ⚷74

Evidence that rifle was discharged when defendant stumbled and that he did not intend to shoot or injure anyone, but was carrying gun with a cartridge in firing chamber and gun pointed forward, while approaching an automobile occupied by persons, would justify conclusion that defendant did not act with due caution and circumspection so that resulting homicide would constitute manslaughter. Pen.Code, § 192, subd. 2.

17. Homicide ⚷74

A killing resulting from the negligent handling of firearms may constitute manslaughter. Pen. Code, § 192, subd. 2.

18. Homicide ⚷9

Finding that homicide was the result of defendant's negligent handling of a rifle without intent to shoot or injure anyone would preclude conviction of either first or second degree murder. Pen. Code, §§ 192, subd. 2, 240, 245.

19. Criminal law ⚷810

Giving of instruction as to deliberation and premeditation necessary to constitute first degree murder in such terms as to leave no ground for the classification of murder of the second degree and refusing to give instruction offered by defendant defining deliberate and premeditated constituted error, though correct instruction on the subject was given which however, merely created a conflict with incorrect instruction.

20. Homicide ⚷22(3)

The true test of whether a killing is "deliberate and premeditated" so as to constitute murder of the first degree is the extent of the reflection and not the duration of time involved.

See publication Words and Phrases, for other judicial constructions and definitions of "Deliberate and Premeditated".

21. Homicide ⚷22(2)

To constitute a "deliberate and premeditated killing", slayer must weigh and consider the question of killing and the reasons for and against such a choice, and, having in mind the consequences, he must decide to and commit the unlawful act causing death, and a mere unconsidered rash impulse, even though it includes an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

22. Criminal law ⚷412(2)

Statement given by defendant to officers without duress and after defendant had been advised of his rights was admissible in prosecution for murder, though defendant was not given an opportunity to examine statement after it had been transcribed, where alleged promise that he would be given such opportunity was made at the conclusion of questioning so that statement could not have been given in reliance on such promise.

23. Criminal law ⚷741(3)

The weight of evidence as to defendant's replies to questions put to him by officers in the light of his claimed confusion and physical condition at the time was for jury.

24. Homicide ⚷230

Evidence sustained conviction of assault with intent to commit murder, notwithstanding defendant's testimony that he had no intent to kill or injure anyone and did not point gun at victim of alleged assault.

25. Homicide ⚷345

Affirmance of conviction of assault with intent to commit murder and reversal of conviction of first degree murder because of refusal to instruct as to manslaughter were not inconsistent, where there was ample evidence that the shooting on which charge of assault with intent to commit murder was based was intentional and there was no negligence claimed in such shooting.

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Mason A. Bailey, Madera, for appellant.

Fred N. Howser, Atty. Gen. and Doris H. Maier, Deputy Atty. Gen., for respondent.

CARTER, Justice.

[1] Defendant was convicted of first degree murder and assault with intent to commit murder. The punishment was not fixed by the jury. The hearing on his plea of not guilty by reason of insanity resulted in his being found sane by the jury. Judgment was thereupon pronounced imposing the death penalty as punishment for the crime charged in count one and imprisonment in the state prison for the term prescribed by law as punishment for the crime charged in count two. A motion for a new trial as to both counts was made and denied. An appeal comes automatically to this court from the judgment and order denying the motion for a new trial on both counts.

The victim of the killing was Wilbur, also called Murphy McSwain, and the victim of the assault was Alvin, also called Scotty McSwain, a brother of Wilbur.

On Saturday afternoon, April 22, 1950, shortly after 6 o'clock, defendant, a man 39 years of age, casually encountered Mrs. Ella McSwain, Wilbur's mother, Josephine Davis, Ella's cousin, and Alvin McSwain, all lifelong acquaintances, at the town of North Fork in Madera County. At Josephine's request defendant drove the group in his car to the McSwain home a few miles from North Fork. After spending a short time at the McSwain home the women requested that they ride with defendant to Yosemite Forks, that being his destination. Henry Chenot joined the group and they went to Yosemite Forks where they attended a dance. Wilbur McSwain was also at the dance. Nothing unusual happened at the dance. The dance ended about 2 in the morning and many of those attending, including the above mentioned persons, went to a place known as Kilroy's Stand, where soft drinks and sandwiches were sold. According to the people's evidence, defendant was there boasting that the army was better than the marine corps and that he was an ex-soldier. Josephine Davis replied that there were a lot of ex-servicemen. Defendant slapped her in the face, and Henry Chenot, Alvin and Wilbur McSwain and others came to the rescue. They pushed defendant to the ground and told him to behave himself. He was allowed to get up and left for his home alone, some 35 to 40 miles away. When leaving he threatened to kill all of them, the whole "bunch," the whole family; that he was going home to get his gun and kill them. In various words seven witnesses who were present at Kilroy's Stand testified to the threat. Witnesses also testified that defendant was not struck in the altercation, and that while he seemed angry when he left, he was otherwise all right. Defendant drove to his home over a winding mountain road (35 to 40 miles away), obtained a rifle and ammunition and proceeded to the McSwain home. He reached the latter one to two hours after having left Kilroy's Stand. He parked his car beside the road about ¼ of a mile from the McSwain home, although there was available a road going to their place which he had used earlier in the day. He left his car, taking his gun which was loaded with a cartridge in the firing chamber. He walked down a pole line rather than the road to the McSwain house. Finding no one there he sat on the porch to wait for them. After about 10 minutes he heard a car drive up. He got up from the porch and in so doing accidentally discharged the rifle. He approached the car on its left side. In it were Marion Donnell and Wilbur McSwain in the front seat and Alvin McSwain and Ted Davis in the back seat. He said he was going to kill all of them except Donnell. The latter remonstrated with him and was told to "stay out of it" or he would be killed. Donnell was on the left side of the front seat. Defendant aimed the gun at those in the front seat and fired, the bullet going behind Donnell's head and striking Wilbur who was then standing by the right front door. Wilbur later died from the wound. He then walked to the back of the car, pointed the rifle into it, and shot three times, inflicting three wounds on Alvin. He was then disarmed by those present and was later taken into custody.

Defendant does not dispute the shooting. In other particulars, however, his story varies with the prosecution's case. He testified that he did not slap Josephine at Kilroy's Stand; he merely patted her "playfully" on the face endeavoring to quiet her, she being in an upset condition; that he was struck in the face thereafter and his teeth knocked out; that he suffered severe pain in his head all the time thereafter until and after he was taken into custody; that he does not remember making threats at Kilroy's Stand; that he went to the McSwain home to find out what the trouble was all about and to see what, if anything, he had done wrong. After leaving the porch at the McSwain home and the accidental discharge of the gun, he stepped in a hole while approaching the car and stumbled. When he recovered his balance the rifle came up in a firing position and discharged (the shot that killed Wilbur). He was merely shooting at the car when he wounded Alvin McSwain. He did not say anything prior to or at the time of the shooting. He did not intend to kill or injure anyone. He also testified that he did not remember much of what happened and did not know what he was doing. There is evidence that he purchased a bottle of whiskey and drank some of it in the course of the evening and also drank some beer, but none that he was intoxicated. An officer to whom he made a statement testified that defendant said he fired the gun, not pointing at anyone but just to scare the McSwains.

[2] There is no contention that the evidence was insufficient to support the conviction of first degree murder and it is clearly ample. Defendant urges that the court erred in refusing to give the jury instructions on manslaughter. The court remarked during the argument to the jury that it would give no such instructions and refused the following instruction offered by defendant: "Manslaughter is the unlawful killing of a human being without malice. Two kinds of manslaughter, the definitions of which are pertinent in this case, are:

"1. Voluntary manslaughter, which is that committed upon a sudden quarrel or heat of passion.

"2. Involuntary manslaughter, which is that done in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." The prosecution also offered instructions on manslaughter but the trial judge refused to give them.

[3–10] It is a settled rule that jury instructions must be responsive to the issues. The issues in a criminal case are determined by the evidence. Here there was evidence which raised the issue of manslaughter. No instructions were given on this issue, although they were requested by both sides. Section 1127 of the Penal Code provides: "* * * *The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses.*" (Emphasis added.) It has been held that a defendant is entitled to instructions on his theory of the case as disclosed by the evidence, no matter how weak. As so ably stated in People v. Burns, 88 Cal.App.2d 867, 871, 200 P.2d 134, 136 with ample citation of authority: "It is *elementary* that the court should instruct the jury upon every material question upon which there *is any evidence deserving of any consideration whatever.* People v.

Quimby, 6 Cal.App. 482, 486, 92 P. 493; People v. Foster, 79 Cal.App. 328, 337, 249 P. 231; People v. Hill, 76 Cal.App.2d 330, 343, 173 P.2d 26. *The fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon.* People v. Perkins, 75 Cal.App.2d 875, 881, 171 P.2d 919; People v. Peete, 54 Cal.App. 333, 356, 359, 202 P. 51; People v. Wong Hing, 176 Cal. 699, 705, 706, 169 P. 357. *That is a question within the exclusive province of the jury. However incredible the testimony of a defendant may be he is entitled to an instruction based upon the hypothesis that it is entirely true.* People v. Perkins, supra, 75 Cal.App.2d page 881, 171 P.2d [919] page 921; People v. Williamson, 6 Cal.App. 336, 339, 92 P. 313; People v. Keefer, 65 Cal. 232, 234, 3 P. 818. It is the duty of the court to instruct the jury in regard to any included offense which the evidence tends to prove. People v. Stofer, 3 Cal.App. 416, 418, 86 P. 734; People v. Carroll, 20 Cal. App. 41, 45, 128 P. 4; People v. Wilson, 29 Cal.App. 563, 564, 156 P. 377; People v. Mock Ming Fat, 82 Cal.App. 618, 256 P. 270; People v. Driscoll, 53 Cal.App.2d 590, 593, 128 P.2d 382. In People v. Carroll, supra, 20 Cal.App., the court said page 45, 128 P. [4] page 6: 'It is undoubtedly the rule that, where there is *any* evidence from which a reasonable inference may be drawn that the crime of which the defendant was convicted was of a lesser degree * * * it is *prejudicial* error to withdraw from the jury the consideration of such evidence and confine the instructions to the crime [charged].'" (Emphasis added.)

[11] It has been repeatedly held that it is reversible error to refuse a manslaughter instruction in a case where murder is charged, and the evidence would warrant a conviction of manslaughter. People v. Wilson, 29 Cal.App. 563, 156 P. 377; People v. Hayes, 9 Cal.App. 301, 99 P. 386; People v. Sidelinger, 9 Cal.App. 298, 99 P. 390; People v. Darrow, 212 Cal. 167, 298 P. 1; People v. Wallace, 2 Cal.App.2d 238, 37 P. 2d 1053; People v. Best, 13 Cal.App.2d 606, 57 P.2d 168.

It is said in People v. Hayes, 9 Cal.App. 301, 305, 99 P. 386, 388, quoting from Stevenson v. United States, 162 U.S. 313, 16 S. Ct. 839, 40 L.Ed. 980: "In the Stevenson Case the judgment was reversed solely for the reason that the trial court refused to submit to the jury the issue of manslaughter. The language of the court, speaking through Justice Peckham, is exceedingly appropriate to the matter before us. It was there said: 'The evidence as to manslaughter need not be uncontradicted or in any way conclusive upon the question; so long as there is some evidence upon the subject, the proper weight to be given it is for the jury to determine. If there were any evidence which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true, and whether it showed that the crime was manslaughter instead of murder. It is difficult to think of a case of killing by shooting, where both men were armed and both in readiness to shoot, and where both did shoot, that the question would not arise for the jury to answer whether the killing was murder or manslaughter, or a pure act of self-defense. The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter or an act performed in self-defense, and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be matter of law for the decision of the court.'"

[12–14] Taking the view defendant expressed to the officer who took a statement from him that he shot to frighten the McSwain boys but had no intention of killing or injuring anyone and did not aim at them, the jury could have found defendant guilty of involuntary manslaughter. As said in People v. McGee, 31 Cal.2d 229, 238, 187 P.2d 706, 712: "If defendant, as he testified, discharged the pistol with intent only to frighten, and not to shoot, deceased, and such act was not done in the exercise of defendant's right of self-defense, he could be found guilty of involuntary manslaughter." In such shooting he might be committing an unlawful act, but it would not amount to a felony. The basis of that statement is that one type of involuntary manslaughter is a killing "in the commission of an unlawful act, not amounting to felony". Penal Code, § 192(2). If the act committed by defendant was unlawful but did not amount to a felony then his crime would be manslaughter. The unlawful act would fall short of assault with a deadly weapon, Penal Code, § 245 or even assault, Penal Code, § 240 if the jury chose to believe his testimony that he had no intent to kill or injure anyone. This follows from the definition of an assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Penal Code, § 240. One could not very well "attempt" or try to "commit" an injury on the person of another if he had no intent to cause any injury to such other person. Assault with a deadly weapon is nothing more than an assault where there is used either a deadly weapon or any means of force likely to produce "great" bodily injury. Penal Code, § 245. The crime here involved, if defendant's testimony is accepted as true, would seem to be a misdemeanor. "Every person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, or any other deadly weapon whatsoever, in a rude, angry or threatening manner, or who in any manner, unlawfully uses the same in any fight or quarrel is guilty of a misdemeanor." Penal Code, § 417.

[15] It has been held that "If the act is wrongful and the firing of a gun under the circumstances is unlawful, the intent may be inferred from the method used, including the position of the parties and all of the surrounding circumstances. 'Where the act is both unlawful and wrongful, and well calculated to inflict serious personal injury, the law will imply malice and an unlawful intention and override any actual intention existing in the mind of the aggressor. Thus, while it is not an assault to fire a gun into the air for the purpose of frightening another, it is an assault, *without regard to the aggressor's intention,* to fire a gun at another or in the direction in which he is standing. The law will not tolerate such a reckless disregard for human life.'" People v. Peak, 66 Cal.App.2d 894, 901, 153 P.2d 464, 467, see also, People v. Corlett, 67 Cal.App.2d 33, 153 P.2d 595, 964; People v. Bumbaugh, 48 Cal.App.2d 791, 120 P.2d 703. But as seen from the foregoing discussion, those cases fly in the face of the wording of §§ 240 and 245 of the Penal Code and People v. McGee, supra. It is true that in assault cases intent need not be specific—to cause any particular injury and it may be implied from the act, People v. McCoy, 25 Cal.2d 177, 153 P.2d 315, but the intent is a question for the jury. If the above quoted statement from the Peak case is accepted as the law of this state, it would always be second degree murder when a person kills another with no intent to do so, but does so as the result of his reckless conduct. It may be that an intent can be inferred from such conduct but it also may constitute manslaughter, as a killing in the "commission of a lawful act which might produce death * * * without due caution and circumspection". Penal Code, § 192(2).

[16, 17] Accepting defendant's testimony that he stumbled, and the gun went off, and that he did not intend to shoot or injure anyone, yet he was carrying the gun with a cartridge in the firing chamber, with the gun pointed forward, and approaching a car occupied by persons, the jury would have been justified in concluding that he did not act with "due caution and circumspection". A killing is manslaughter where it is done in the commission "of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection". Penal Code, § 192(2). It has been held repeatedly that a killing resulting from the negligent handling of firearms may be manslaughter. People v. Searle, 33 Cal.App. 228, 164 P. 819; People v. Hubbard, 64 Cal.App. 27, 220 P. 315; People v. Attema, 75 Cal.App. 642, 243 P. 461; People v. Sidwell, 29 Cal.App. 12, 154 P. 290; People v. Sica, 76 Cal.App. 648, 245 P. 461. Under some circumstances a claim supported by evidence that the killing was accidental will not justify an instruction on manslaughter, for the defendant is either guilty of murder or not guilty of any crime. See People v. Eggers, 30 Cal.2d 676, 185 P.2d 1. But here, as above

shown, the jury could have found defendant guilty of manslaughter on the ground that the "accident" was the result of his negligence.

[18] Defendant's defense, as seen, would not exonerate him completely, but if believed, *he could not be found guilty of either first or second degree murder* Thus, the jury, if it believed defendant's evidence, could find that he had committed an offense which was neither first nor second degree murder, but a lesser public offense—manslaughter. Under the instructions, however, it could not find him guilty of that lesser offense. It had to find him guilty of murder (first or second degree) or acquit him.

The cases relied upon by the people are not controlling. In People v. Mandell, 48 Cal.App.2d 806, 120 P.2d 921; People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627; People v. La Vers, 130 Cal.App. 708, 20 P.2d 967; People v. DuBois, 16 Cal.App.2d 81, 60 P.2d 190; People v. Gibson, 92 Cal.App.2d 55, 206 P.2d 375, and People v. Danielly, 33 Cal.2d 362, 202 P.2d 18, there was no evidence upon which a manslaughter conviction could be based (defendant was guilty of murder or not guilty) and thus an instruction on the subject of manslaughter would not be proper. People v. Manzo, 9 Cal.2d 594, 72 P.2d 119, held that words could not constitute provocation sufficient to reduce the offense to manslaughter, but was overruled by People v. Valentine, 28 Cal.2d 121, 169 P.2d 1.

Defendant rests his claim for a manslaughter instruction on the basis of a voluntary killing in the heat of passion. By reason of the result reached that point need not be discussed. He probably was not entitled to such an instruction because he positively testified that he did not intend to kill or injure anyone, thus it was not a voluntary killing. He said he went to the McSwain home to see what he had done wrong—no anger or passion was suggested.

[19–21] In addition to the error in failing to instruct on the subject of involuntary manslaughter, the court erred in giving the following instruction: "There need be, however, no considerable space of time devoted to deliberation or between the formation of the intent to kill and the act of killing. It is only necessary that the act of killing be preceded by, and be the result of a concurrence of will, deliberation and premeditation on the part of the slayer to constitute murder in the first degree, regardless of how rapidly or slowly these mental processes succeed each other or how quickly or tardily they are followed by the act of killing," and in refusing to give an instruction offered by defendant defining "deliberate" and "premeditated" as set forth in People v. Bender, 27 Cal.2d 164, 183, 163 P.2d 8. The word "considerable," used as an adjective, means "Worthy of consideration; of importance or consequence." (Webster's New International Dictionary (1943)). The instruction as given leaves no ground for the classification of murder of the second degree. People v. Honeycutt, 29 Cal.2d 52, 60, 172 P.2d 698; People v. Bender, supra, 27 Cal. 2d 182–185, 163 P.2d 8; see also People v. Valentine, 28 Cal.2d 121, 134, 169 P.2d 1. While the court correctly instructed the jury as follows: "The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree. To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, decide to and commit the unlawful act causing death," such instruction, under the circumstances, does no more than create a conflict with the incorrect instruction and we cannot speculate on which of the conflicting instructions the jury followed. People v. Dail, 22 Cal.2d 642, 653, 140 P.2d 828; People v. Honeycutt, supra.

[22, 23] He was prejudiced, asserts defendant, by the failure of the officers to permit him to examine the statement given by him to them after it was transcribed. He was told the statement would be typed and he would be given an opportunity to examine it and requested to sign it. Neither was done. While defendant stated that at the time he gave the statement he was suffering severe pain in his head and was confused, there is ample evidence that he was not acting under duress, and he was fully advised of his rights. Defendant is in no position to assert that in giving his statement he relied upon a promise that the statement would be transcribed and he could examine it, as the claimed "promise" was made *at the conclusion* of the questioning. We are not referred to any authority that extrajudicial statements made by one accused of a crime must be transcribed and examined by the accused before they are admissible in evidence. The weight of defendant's replies to the questions put to him in the light of his claimed confusion and physical condition was for the jury.

[24] Finally, defendant argues that there was insufficient evidence that he "wilfully, unlawfully, feloniously and with malice aforethought" and intentionally assaulted Alvin McSwain with the intent to murder him. He refers to his testimony that he had no intent to kill or injure anyone and did not point the gun at Alvin. There is ample evidence as heretofore outlined to sustain the conviction of assault with the intent to commit murder.

[25] There is no inconsistency in an affirmance of that conviction and a reversal of the murder count because there was no negligence claimed in the shooting of Alvin. There is ample evidence that it was intentional.

No claim is made of any error in the insanity phase of the trial. It appears that defendant was confined to a state mental hospital for six years, ending over ten years ago, with an initial diagnosis of dementia praecox, later changed to traumatic psychosis, apparently caused by a skull fracture. Defendant testified but produced no medical witnesses. Four qualified doctors testified that defendant was sane when the killing and assault took place.

The judgment and order denying a new trial on the first count (first degree murder) are reversed. The judgment and order denying a new trial on the second count (assault with intent to commit murder) are affirmed.

We concur:

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concur.

SPENCE, Justice (concurring and dissenting).

I concur in the affirmance of the judgment of conviction and the order denying a new trial as to the second count, which charged defendant with an assault with intent to commit the murder of Alvin McSwain. I dissent, however, from the reversal of the judgment and the order denying a new trial as to the first count, which charged defendant with the murder of Wilbur McSwain.

The majority opinion bases the reversal of the judgment as to the first count upon alleged prejudicial error (1) in refusing to give an instruction upon involuntary manslaughter and (2) in giving and refusing to give certain instructions relating to first and second degree murder. In my opinion, a review of the record, including the evidence, shows that defendant was accorded a fair trial, and that the trial court committed no prejudicial error which would warrant a reversal of the judgment as to either count.

It must be remembered that since 1914, a reversal may not be based upon mere error in instructing the jury "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice," Const., Art. VI, § 4½. As was said in People v. Watts, 198 Cal. 776, at page 793, 247 P. 884, at page 890: "Since the adoption of section 4½ it no longer is the rule in this state that injury is presumed from error. Before the reversal of a judgment of conviction may be had it must affirmatively appear to the satisfaction of this court, after an examination of the entire cause, including the evidence, that the accused may well have been substantially injured by the error of which he complains."

The cited constitutional provision places a heavy duty upon this court, in that our task does not end with the determination that some error may have crept into the lengthy proceedings in the trial court. If this court determines that any error occurred, it is then confronted with the equally important task of weighing the possible prejudice of that error in the light of the situation shown by the entire record. The duty thus cast upon this court is a grave one, and more particularly in a case where a human life is at stake; but a review of the record here convinces me that the only error committed was in the failure of the trial court to give an instruction on involuntary manslaughter, and such error was not prejudicial for the reasons hereinafter set forth.

The first observation to be made, after reviewing the entire record, is that the overwhelming evidence points unerringly to the commission by defendant of the cold-blooded, carefully planned, and premeditated murder of Wilbur McSwain; and similarly, to the commission of a deliberate assault with the intent to murder Alvin McSwain. Numerous witnesses testified to the threats to "kill the whole family" made by defendant long before the crimes were committed, as well as to like threats made immediately prior to the actual commission of the offenses. The evidence covering the admitted acts of defendant in the long period of time intervening between the first threats and the subsequent firing of several shots at his victims, and his admitted acts at the time of the shooting, furnishes corroboration to the point of demonstration of defendant's deliberate plan and purpose to kill his threatened victims.

As against this overwhelming testimony indicating defendant's guilt of the offenses of which he stands convicted, the record discloses that defendant gave conflicting versions of what occurred. To the officers following his arrest, he admitted that all the shots were fired intentionally but "just to scare the people." Before the jury, he testified that the fatal shot which killed Wilbur McSwain was fired accidentally rather than intentionally, and that while he intentionally aimed the other shots at the car, he did not intend to kill or injure anyone.

Turning now to the claimed error in giving and refusing instructions, attention will first be directed to the instructions relating to murder.

The Instructions Relating to Murder

It is elementary that the instructions must be considered as a whole, and that "Whether a jury has been correctly instructed is not to be determined from a consideration of parts of an instruction or from particular instructions, but from the entire charge of the court." (8 Cal. Juris. 631, § 607 and cases cited.) It is therefore clear that error may not be predicated upon a single sentence or paragraph of an instruction when read out of context. People v. Frazier, 88 Cal.App. 2d 99, 105, 198 P.2d 325. Only a small portion of the instructions relating to murder is quoted in the majority opinion, and while it appears unnecessary to set forth in its entirety the trial court's very extensive charge on this subject, sufficient should be quoted to show that error may not be predicated upon the portion criticized by the majority.

The trial court fully instructed the jury upon the statutory definition of murder, Pen.Code, § 187, and the degrees of murder, Pen.Code, § 189, and expanded upon those definitions in the following manner:

"All murder which is perpetrated by any kind of wilful, deliberate and premeditated killing is murder of the first degree.

"To constitute this kind and degree of homicide the killing must be accompanied by a clear, deliberate intent to take life. The intent to kill must be the result of deliberation and must have been formed upon a pre-existing reflection and not under a heat of passion or other condition such as precludes the idea of deliberation.

"There need be, however, no considerable space of time devoted to deliberation or between the formation of the intent to kill and the act of killing. It is only necessary that the act of killing be preceded by, and the result of a concurrence of will, deliberation and premeditation on the part of the slayer to constitute murder in the first degree, regardless of how rapidly or slowly these mental processes succeed each other or how quickly or tardily they are followed by the act of killing.

"The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree. To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, decide to and commit the unlawful act causing death.

"Murder of the second degree must be distinguished not only from murder of the first degree, on the one hand, but from manslaughter, on the other.

"If the unlawful killing of a human being is done with malice aforethought, but without deliberation and premeditation, that is, without the wilful, deliberate and premeditated intent to take life which is an essential element of first degree murder, and is not perpetrated by means of poison, or lying in wait, or torture, and is not committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary or mayhem, then the offense is murder in the second degree. In practical application this means that the unlawful killing of a human being with malice aforethought, but without a deliberately formed and premeditated intent to kill, is murder of the second degree."

Considering the above-mentioned instructions together it is clear that the trial court was endeavoring to follow the rules enunciated in the cases upon which the majority relies, People v. Bender, 27 Cal.2d 164, 163 P.2d 8; People v. Valentine, 28 Cal.2d 121, 169 P.2d 1; People v. Honeycutt, 29 Cal.2d 52, 172 P.2d 698, and I am satisfied that the charge as a whole fully and fairly advised the jury concerning the distinction between first and second degree murder.

The challenged instructions are far different from the instructions which were condemned in the cases last cited. The real vice of such condemned instructions, as pointed out by this court in People v. Bender, supra, 27 Cal.2d 164, at page 184, 163 P.2d 8 at page 19, did not rest in the giving of the instruction that there need be "no appreciable space of time between the intention to kill and the act of killing". This instruction was declared to be "abstractly a correct statement of the law", 27 Cal.2d at page 182, 163 P.2d at page 19, but it was further said that it should not be given to a jury "without explanation" and that it was "misleading when read in the context in which it was used", 27 Cal.2d at pages 182–183, 163 P.2d at page 19. In that case, the above declaration was immediately followed in the same sentence by the words "they may be as instantaneous as successive thoughts of the mind" and was thereafter followed by instructions that "A man may do a thing willfully, deliberately and intentionally from a moment's reflection as well as after pondering over the subject for a month or a year"; and that "He can premeditate, that is, think before doing the act, the moment he conceives the purpose, as well as if the act were the result of long preconcert or preparation", 27 Cal.2d at page 182, 163 P.2d at page 19. It was stated 27 Cal.2d on page 183, 163 P.2d on page 19 of the Bender case that the effect of this combination of instructions was to eliminate the requirement of any "deliberation or premeditation in forming the intent" to kill or "deliberation and premeditation between the intent and the act of killing". As was said in People v. Valentine, supra, 28 Cal.2d 121, at page 134, 169 P.2d 1 at page 9: "As held in People v. Bender (1945), supra, 27 Cal.2d 164, 182–185, 163 P.2d 8, *this combination of instructions, taken as a whole,* substantially deletes the only difference, in this type of case, between first and second degree murder." (Emphasis added.)

It is clear that we have before us no such "combination of instructions" as was condemned in the cited cases. The trial court here adopted the substance of the suggested instructions set forth 27 Cal.2d on pages 184 and 185, 163 P.2d 8 of the Bender case, and gave due explanation of, and proper emphasis to, the real meaning of and necessity for deliberation and premeditation. If the majority of this court has determined to go further and to declare that "considerable space of time" must be devoted to deliberation and premeditation in forming the intent to kill or between the intent to kill and the act of killing, then it would be proper for this court to so declare for the guidance of the bench and bar. The word "considerable" conveys the meaning of "rather large in extent" (Webster's New Inter. Dict., 2d Ed.), and any such declaration would in effect repudiate the rule contained in this court's suggested instruction that "Neither the statute nor the court undertakes to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent which is truly deliberate and premeditated." People v. Bender, supra, 27 Cal.2d 164, 184–185, 163 P.2d 8, 20. I do not favor the repudiation of the quoted suggested instruction nor the extension of the rules set forth in the cited cases; and I am convinced that both reason and the cited cases support the conclusion that there was no error in this portion of the trial court's charge dealing with the degrees of murder.

The Refusal To Instruct On Manslaughter

In considering this phase of the appeal, it is significant to note that the only point now argued by defendant is that the jury should have been instructed on *voluntary* manslaughter as "the jury should have had the right to determine whether or not the alleged murder was committed in the heat of passion." This is a complete abandonment of the claim made at the trial, which was that the defendant's acts constituted no more than *involuntary* manslaughter. I therefore agree with the implication in the majority opinion that defendant was not entitled to an instruction on *voluntary* manslaughter as "he positively testified that he did not intend to kill or injure anyone." Furthermore, I agree with the holding of the majority opinion that however fanciful and unworthy of belief defendant's conflicting versions of the occurrences may appear to be, an instruction on involuntary manslaughter should have been given. It was therefore error to refuse to give such an instruction, but the question remains as to whether there is any likelihood that the jury would have rendered a different verdict if instructions on involuntary manslaughter had been given; or in other words, whether the error was prejudicial.

It will be recalled that defendant was charged with two offenses: (1) the murder of Wilbur McSwain and (2) assault with intent to commit the murder of Alvin McSwain. Under the evidence and instructions, no conviction could have been had on either of the particular offenses charged unless the jury found that defendant had a specific intent to kill the victim. Defendant's claim on the trial was that he never intended to kill or injure either of his victims, and this claim was based upon the evidence recited in the majority opinion and above summarized.

With respect to the first count, the jury was further instructed: "Thus in the crime of murder [with] which the defendant is accused in this case in Count One of the information, the specific intent to kill is a necessary element of the crime."

With respect to the second count, the jury was instructed in part:

"In the crime of assault with intent to commit murder, there must exist in the mind of the perpetrator the specific, preconceived intent to kill a human being, and a person may not be convicted of such an offense if that specific intent is not established by the evidence.

"When the information charges that the defendant committed an assault with a deadly weapon with intent to commit murder, if the jury should find that he committed the assault with a deadly weapon but that he did not do so with a specific, preconceived intent to kill, the defendant may be found guilty only of the lesser offense, namely, assault with a deadly weapon."

The jury was given the customary instructions regarding the presumption of innocence, the burden of proof, and its duty to acquit the defendant upon any charge unless his guilt had been satisfactorily proved beyond a reasonable doubt. It was given a further instruction with respect to reasonable doubt and the degrees of murder, reading: "When upon the trial of a charge of murder, the jury is convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but has a reasonable doubt whether such murder was of the first or of the second degree, the jury must give to such defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree."

The jury was further instructed upon its duty to fix the punishment in the event that it found defendant guilty of first degree murder. It therefore appears that the jury was otherwise fully and fairly instructed upon every phase of the case.

Under the given instructions the jury brought in a verdict finding defendant guilty on count one of first degree murder, and fixing the punishment at death; and a further verdict finding defendant guilty on count two of assault with intent to commit murder. It seems obvious that had the jury placed the slightest credence in either of defendant's conflicting versions concerning his claimed unintentional shooting of his victims, or even had the jury any reasonable doubt concerning his intentions, it would not have brought in a verdict finding defendant guilty of first degree murder and fixing the penalty at death upon the first count; and that it would not have brought in a verdict of assault with intent to commit murder upon the second count. The fact that the jury brought in a verdict finding defendant guilty of an offense higher than second degree murder on the first count, and that it likewise brought in a verdict finding defendant guilty of assault with intent to commit murder, rather than guilty of the included offense of assault with a deadly weapon, affirmatively shows that the jury rejected, in all material particulars, defendant's conflicting stories concerning his unintentional shooting of his victims, and determined, as the overwhelming evidence showed, that his offenses were intentionally committed and were preceded by deliberation and premeditation.

The instant case is closely parallel to People v. Mitchell, 14 Cal.2d 237, at page 242, 93 P.2d 121, at page 123, where this court, in discussing possible prejudice in the failure to give a manslaughter instruction, said: "If under the evidence and these instructions the jury rendered a verdict calling for the death penalty, it is not reasonable to suppose that their verdict would have been different had the proposed instruction on manslaughter been given." See, also, People v. Driscoll, 53 Cal.App.2d 590, 595, 128 P.2d 382; People v. Miller, 67 Cal.App. 674, 679, 228 P. 68.

The conclusion that the judgment in this case should not be reversed finds support in the above-mentioned authorities and does not conflict with the decision in any of the cited cases. Those cases wherein judgments of conviction have been reversed for the failure or refusal to give instructions on an included offense are clearly distinguishable from the instant case, and are of two types. In the first type, the crime charged was not divided into degrees and under the instructions, the jury was necessarily required to exonerate defendant entirely or to convict him of the offense charged. People v. Comyns, 114 Cal. 107, 45 P. 1034; People v. Demasters, 105 C

669, 39 P. 35; People v. Burns, 88 Cal.App.2d 867, 200 P.2d 134; People v. Cicerelli, 123 Cal.App. 48, 10 P.2d 792; People v. Mock Ming Fat, 82 Cal.App. 618, 256 P. 270; People v. Stofer, 3 Cal.App. 416, 86 P. 734. In that type of case, the jury might well conclude that a public offense had been committed and therefore be reluctant to exonerate the defendant. Plainly, the failure to instruct on the included offense might well prejudice the defendant. In the second type, the crime charged was divided into degrees and defendant was convicted of the lesser degree, and might well have been convicted of an included offense if proper instructions thereon had been given. People v. Foss, 85 Cal.App. 269, 259 P. 123; People v. Wilson, 29 Cal.App. 563, 156 P. 377; People v. Hayes, 9 Cal.App. 301, 99 Cal.App. 386; People v. Sidelinger, 9 Cal.App. 298, 99 P. 390. Not a single case has been cited, nor does independent research disclose any case where any court of this state has reversed a judgment of conviction where defendant had been convicted of the highest possible degree of a crime, divided into degrees, merely because the trial court failed or refused to give instructions on an included offense. The broad language employed in some of the cases cited in the majority opinion must be read in the light of the particular situations which were being considered by the courts.

From what has been said, it clearly appears that there is not the slightest possibility that the jury would have brought in a different verdict had an instruction on involuntary manslaughter been given. I therefore conclude that the error of the trial court in failing to give such instruction is precisely the type of error to which the constitutional provision was directed, and that it is our duty under the constitutional mandate to affirm the judgment of conviction of first degree murder.

I would therefore affirm the judgments of conviction and the orders denying the motions for new trial as to both counts.

SHENK and EDMONDS, JJ., concur.

Rehearing denied; SHENK, EDMONDS, and SPENCE, JJ., dissenting.

HALL v. OSELL.

Civ. 4068.

District Court of Appeal, Fourth District, California.

March 15, 1951.

Rehearing Denied April 12, 1951.

Hearing Denied May 10, 1951.

Robert W. Hall brought action against L. N. Osell for damages for destruction of airplane which plaintiff had rented to defendant, and which crashed when plaintiff flew airplane into fog or cloud bank. The Superior Court of Kern County, W. L. Bradshaw, J., rendered a judgment for the defendant, and the plaintiff appealed. The District Court of Appeal, Mussell, J., held that evidence established as a matter of law that defendant was negligent.

Judgment reversed.

1. Bailment ⚿31(3)

In action for damages for destruction of rented airplane, evidence established as a matter of law that defendant was negligent in violating civil aviation rules by flying into cloud or fog bank in which airplane was enveloped at time of crash, and that he flew through scattered clouds while letting down for intended landing at airport, and that such negligence was the proximate cause of the accident entitling plaintiff to recover for loss of airplane.

2. Bailment ⚿11

A bailee is responsible in damages to bailor for any injury to bailed property resulting from failure to exercise a proper degree of care in protecting it.

3. Bailment ⚿13

Where bailment is for sole benefit of bailee, he must exercise great care or extraordinary diligence.

4. Bailment ⚿31(3)

In action for damages for destruction of rented airplane, testimony of defendant that when he was attempting to land at airport airplane became involved in cloud and that when he attempted to nose the airplane up, it did not climb in manner in which he was accustomed to have it climb, and that it was sluggish, was insufficient to establish that alleged faulty condition of airplane was cause of crash.

5. Appeal and error ⚷1002

An appellate court will not interfere with judgment where there exists a substantial conflict in the evidence, but such rule does not relieve an appellate court of duty to analyze evidence in light of reason and human experience, and of giving consideration to motives and propensities which tend to influence or prompt human action, in effort to solve question whether judgment is reasonably and substantially sustained by evidence.

6. Appeal and error ⚷1002

There must be more than a conflict of mere words to constitute a conflict of evidence, and the contrary evidence must be of a substantial character, in order to justify reversal.

7. Trial ⚷139(1)

Though jurors are sole judges of the facts, question whether there is substantial evidence is always a question of law for court, and, in determining such question, credulity of courts is not to be deemed commensurate with the facility or the vehemence with which a witness swears.

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W. E. James, Bakersfield, for appellant.

Dorsey, Campbell & Bultman, Bakersfield, for respondent.

MUSSELL, Justice.

Action for damages for destruction of an aircraft.

Plaintiff operated a "for hire" flying service based at the Kern County airport near Bakersfield. During the early morning of June 19, 1947, the defendant hired one of plaintiff's aircraft for the purpose of flying that day from Bakersfield to Santa Barbara, via Santa Maria, and return to Bakersfield.

The defendant, with his wife and daughter as passengers, "took off" from the Kern county airport for Santa Maria at approximately 11:30 a. m. and proceeded directly to the vicinity of Santa Maria, where, while the defendant was preparing to land, he flew the aircraft into a fog or cloud bank, and in attempting to make a turn, crashed it into a hillside approximately ten miles southwesterly from Santa Maria. The aircraft was destroyed by the crash and plaintiff filed the instant action for damages sustained by reason of its destruction.

The cause was tried by the court without a jury and a judgment rendered for the defendant.

Plaintiff appeals, contending that the evidence is insufficient to support the findings and judgment.

The complaint sets forth four causes of action based on the liability of defendant as a bailee. The answer consists of a general denial and three special defenses in which contributory negligence and "unavoidable accident" are alleged.

Facts.

Defendant, who held a private pilot's license to fly a plane by "contact" rules only, arrived at the airport with his wife and daughter at about 7:00 o'clock a. m on the day of the accident. He inquired as to the weather conditions and was told at the local United States weather bureau that the weather conditions over Santa Maria "would not allow flying." While waiting for a further weather report, defendant took his daughter and her girl friend up in the airplane for a ten minute local flight in the vicinity of the airport. During this flight, the aircraft performed satisfactorily and defendant had no difficulty with it. At about 11:30 o'clock a. m., he obtained a clearance from the weather bureau for his flight and was informed that there was a broken cluster of clouds over Santa Maria, with a ceiling of about 1,300 feet. Defendant was then instructed by Mr. Webber, plaintiff's agent in charge of the airplane, that if the ceiling at Santa Maria was 1,300 feet or above, defendant should then proceed to the ocean, underneath the overcast, and thence follow the coast line to Santa Barbara; or, if the ceiling was less than 1,300 feet at Santa Maria, to land there and get further weather data and instructions before proceeding to Santa Barbara; or, if the weather at Santa Maria "was too bad", to come back. Webber made a pre-flight inspection of the "whole" plane, after which he started it and defendant, with his wife and daughter, "took off". Defendant climbed to an elevation of about 8,000 feet, during which the airplane performed satisfactorily and gave him no trouble. After he passed over the range of mountains between the airport and Santa Maria, he idled the plane and glided down. When he approached Santa Maria, he could see scattered clouds and a fog bank to the south and west. At an altitude of approximately 1,500 feet, he sighted the airport to his left and started to land. He testified that when he started down to land, he went through a "big space" in the broken clouds and in the process of losing altitude, this cloud came in, "involving" the plane, confronting him "like a wave in the ocean." His altitude at that time was approximately 800 feet. He attempted to make a 180 degree turn, pushed the throttle in to get all the power possible, and nosed the plane up, and in less than five seconds the plane struck the hillside, at an elevation of somewhere between 1,000 and 1,300 feet.

The defendant testified that after "he nosed the plane up, the plane did not climb in the manner in which he was acccustomed to have it climb. It was sluggish, not like I was accustomed to have it do." It is this testimony upon which the defendant relied and upon which the trial court concluded that the accident was due, in part at least, to a mechanical failure of the aircraft involved. This evidence is, at best, a statement of the witness as to his feeling at a time when he was obviously involved in a very predicament and he may well have felt under the circumstances that the plane did not respond sufficiently in the emergency. However, the record shows that in a matter of five seconds the plane actually was elevated at least 200 feet after being "nosed up" and while traveling at a speed of approximately 125 miles per hour, and there is no showing that it was not performing properly for such an aircraft.

[1] The record further shows that the defendant was by his license, limited to contact flying, which was defined as flying with reference to points on the ground; that he was familiar with the rules and regulations with respect to such flying; that section 60.30, subd. (a) and (b) of Civil Air Regulations, Code of Federal Regulations, Title 14, Civil Aviation, Visual Flight Rules, provides as follows:

> "Ceiling and distance from Clouds. Aircraft shall comply with the following requirements as to ceiling and distance from clouds:
>
> "(a) Within Central Zones. Unless authorized by air traffic control, aircraft shall not be flown when the ceiling is less than 1,000 feet, or less than 500 feet vertically and 2,000 feet horizontally from any cloud formation.
>
> "(b) Elsewhere. When at an altitude of more than 700 feet above the surface aircraft shall not be flown less than 500 feet vertically and 2000 feet horizontally from any cloud formation; when at an altitude of 700 feet or less aircraft shall not be flown unless clear of clouds."

It is apparent that the defendant violated these rules, not only when he actually flew into the cloud or "fog bank" in which the aircraft was enveloped at the time of the crash, but also when he flew through scattered clouds while letting down for his intended landing at the airport. Furthermore, he was advised of the existence of scattered cloud banks over Santa Maria prior to undertaking the flight and was also advised to return to Bakersfield if the weather at Santa Maria "was too bad." Under these circumstances, it is apparent that the negligence of the defendant was the proximate cause of the accident and that the plaintiff, as bailor, was entitled to recover for the loss of his airplane.

[2, 3] As was said in Baugh v. Rogers, 24 Cal.2d 200, 215, 148 P.2d 633, 641, 152 A.L.R. 1043: "* * * it is elementary in the law of bailments that a bailee is responsible in damages to the bailor for any injury to the bailed property resulting from a failure of the bailee to exercise a proper degree of care in protecting it. See Milgate v. Wraith (1942), 19 Cal.2d 297, 303, 121 P.2d 10; Brown v. Roland (1940), 40 Cal.App.Supp.2d 825; 104 P.2d

138. 'Where the bailment is for the sole benefit of the bailee, he is bound to exercise great care or extraordinary diligence' (8 C.J.S., Bailments, § 29, p. 280; see, also, Civ.Code, § 1886); and 'Where, through negligence of the bailee, bailed property in his hands is injured * * * the bailor is entitled to recover such a sum as will reasonably compensate him for the injury sustained * * *.' 6 Am.Jur. 379, § 294; see, also, Civ.Code, § 1889."

[4–7] The trial court evidently concluded that the accident was caused by the failure of the airplane to function properly and that the collision resulted through no fault or negligence on the part of the defendant. However, as heretofore noted, the only testimony in the record relied upon to establish such alleged faulty condition of the airplane was the quoted testimony of the defendant. This testimony, in our opinion, is not of such a substantial character as to reasonably support the judgment. The rule is that an appellate court will not interfere with the judgment where there exists a substantial conflict in the evidence. As stated in Herbert v. Lankershim, 9 Cal.2d 409, 471–472, 71 P.2d 220, 251:

"This rule, however, does not relieve an appellate court of its duty of analyzing the evidence in the light of reason and human experience and giving consideration to the motives and propensities which tend to influence or prompt human action, in an effort to solve the question as to whether the judgment is reasonably and substantially sustained by the evidence.

"* * * There must be more than a conflict of mere words to constitute a conflict of evidence. The contrary evidence must be of a substantial character, such as reasonably supports the judgment as applied to the peculiar facts of the case. The rule announced in Morton v. Mooney et. al., 97 Mont. 1, 33 P.2d 262, 266, correctly states the rule which has been approved by this court in a number of our decisions. It is thus stated:

"'While the jurors are the sole judges of the facts, the question as to whether or not there is substantial evidence in support of the plaintiff's case is always a question of law for the court (Grant v. Chicago, etc. Ry. Co., 78 Mont. 97, 252 P. 382), and, in determining this question, "the credulity of courts is not to be deemed commensurate with the facility or vehemence with which a witness swears. 'It is a wild conceit that any court of justice is bound by mere swearing. It is swearing creditably that is to conclude its judgment.'" ' "

Applying the rules announced to the situation before us, we find no substantial evidence to support the judgment and it is, therefore, reversed.

GRIFFIN, Acting P. J., concurs.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.

102 Cal.App.2d 712

LEMERE et al. v. SAFEWAY STORES, Inc. et al.

Civ. 14509.

District Court of Appeal, First District, Division 1, California.

March 8, 1951.

Hearing Denied May 3, 1951.

Constance Lemere and her husband sued Safeway Stores, Inc., and others to recover for personal injuries sustained by Constance when she tripped over a box of beer bottles left standing in an aisle of a store operated by the named defendant. The Superior Court, Contra Costa County, Harold Jacoby, J., rendered judgment for plaintiffs, and plaintiff Constance appealed from that portion of the judgment which awarded her only the sum of $7,500. The District Court of Appeal, Bray, J., held that the verdict was adequate.

Affirmed.

1. Appeal and error 🔑932(1)

On appeal by plaintiff from allegedly inadequate damage award in personal injury action, appellate court would have to consider facts most favorable to defendants.

2. Damages ⚷130(4)

Award of $7,500 for loss of wages, pain and suffering, and injuries consisting of deep cut on leg, minor cuts on hands, head injuries, and compression fracture of the twelfth thoracic vertebra was adequate.

3. Trial ⚷295(9)

In action for personal injuries sustained by customer when she tripped over box of beer bottles left standing in aisle of store, trial court's instructions taken as whole, were not such as to give jury impression that they were to apply one rule as to degree of proof required for recovery of past damages and injuries and another degree of proof as to future damages and injuries, even though term "certain" and term "reasonably certain" as applied to injuries and damages were used interchangeably throughout instructions. Civ.Code §§ 3283, 3333.

4. Trial ⚷243

Even though instructions given, considered separately, were proper in themselves, they would be improper if, taken together, they would sound conflicting or would be confusing to jury.

5. Trial ⚷267(1)

In action for personal injuries sustained by customer when she tripped over box of beer bottles left standing in aisle of store, trial court's instructions sufficiently covered subject of expert testimony, even though not in language offered by plaintiff.

6. Trial ⚷267(1)

A party is not entitled to have jury instructed in any particular phraseology and may not complain on ground that his requested instructions are refused if court, of its own motion or otherwise, correctly announces substance of law applicable to case.

7. Trial ⚷260(10)

In action for personal injuries sustained by customer when she tripped over box of beer bottles left standing in aisle of store, there was no prejudicial error in trial court's failure to give requested instruction that measure of damages would be amount which would compensate for all detriment proximately resulting from injuries involved, whether such damages could have been anticipated or not, where court thoroughly instructed on elements of damage which could be considered and there was no issue on question of anticipation or even any suggestion that, for recovery, results must have been anticipated, so that jury could not have been misled on subject. Civ.Code, §§ 3283, 3333.

8. Damages ⚷216(10)

In action for personal injuries sustained by customer when she tripped over box of beer bottles left standing in aisle of store, trial court's instruction on mental suffering was sufficient.

9. Trial ⚷260(10)

In action for personal injuries sustained by customer when she tripped over box of beer bottles left standing in aisle of store, there was no error in trial court's failure to give plaintiff's proposed instruction which would have charged jury that they should keep in mind fact that value of dollar had changed materially and base their verdict on value of dollar at time of verdict, where court did instruct that jury might estimate damages by considering them in connection with their own knowledge and experience in affairs of life. Civ. Code, §§ 3283, 3333

10. Appeal and error ⚷933(1)

Where trial court has denied motion for new trial based upon inadequacy of verdict, every intendment is to be indulged in support of trial court's action, in view of facts that trial court heard and saw witnesses, presumably weighed evidence on motion for a new trial, and was satisfied with amount of verdict.

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Howard Magee, San Francisco, Philander Brooks Beadle, San Francisco, for appellant Constance Lemere.

Tinning & DeLap and J. Vance Porlier, Richmond, for respondents.

BRAY, Justice.

In an action for personal injuries a jury awarded plaintiff Albert O. Lemere $8,850 and plaintiff Constance Lemere $7,500.

Plaintiff Constance appeals from that portion of the judgment entered thereon which awarded her only said sum of $7,500, claiming that certain instructions are erroneous. Plaintiff Albert did not appeal, nor did defendants.

Evidence.

On November 15, 1947, while shopping in the Safeway Store at Pittsburg, plaintiff Constance,[1] 22 years of age, tripped over a box of beer bottles that had been left standing in an aisle. She was knocked unconscious. She sustained a deep cut on the leg and minor cuts on her hand; also head injuries, and apparently a compression fracture of the twelfth thoracic vertebra. There was some disagreement in the evidence concerning this injury. She claimed her right leg was paralyzed for approximately five months. She was in a hospital for thirty-eight days immediately following the accident and was confined to her bed for another five or six months. From then until the trial (a period of approximately fifteen months), she had been confined either to bed or lying down, an hour being the longest she had stayed up at any one time. She appeared in court in a wheel chair. She had been attended by at least nine doctors, and been in four different hospitals. She was confined in the Antioch Hospital on nine different occasions, a total of 127 days (the last confinement of seven days being approximately five months before the trial). Her right leg was in traction for approximately twenty days. Then both legs were placed in traction. Traction had been applied eight or nine different times. She was in a cast from the chest to below the hips for about six months. A second cast remained on about four months. Day and night since the removal of the cast she had been required to wear a steel and canvas brace. Without the brace she claims that she has terrible pains in her back and leg. She claims that severe headaches persist, and that continuously, except for about thirty days, she has run a fever. She testified that before the accident she was in good health, worked as a waitress, and in addition, with the help of her mother-in-law, did household duties for her husband and child. Now, the housework was done entirely by the mother-in-law. She worked as a waitress for approximately eighteen months prior to a month before the accident, earning with tips an average of about $75 per week. The bills for hospital, nursing, drug and medical expense to the time of trial totaled $7,096.62. This amount probably was included in the jury's allowance to the husband of $8,850.

Plaintiff concedes that the damages allowed her were not inadequate as a matter of law, but contends they are inadequate as a matter of fact. She contends that by the allowance of the special damages including hospital fees incurred shortly before the trial and medical expenses to the time of trial, the jury must have found that she was injured by the fall and that those injuries continued at least until the time of trial. Defendants contend, first, that she received no serious injury particularly, no compressed fracture of the twelfth thoracic vertebra, and secondly, if she did, she had long since recovered fully and was now exaggerating her condition. Depending upon whether or not plaintiff's testimony as to her subjective symptoms is believed, the evidence would support either a finding that she suffered serious injury from which she had not recovered and which probably would continue in the future, or a theory either that she had not injured her vertebra, or, if she had, that she had fully recovered. Obviously, the jury must have found that she received injury as it apparently allowed the husband full compensation for the expenses incurred and gave him additionally approximately $1,500. About twenty-two months had elapsed between the accident and the trial. Plaintiff contends that the jury should have awarded her $75 per week loss of wages for that period, or approximately $6,600, leaving from the verdict only about $900 for pain and suffering and permanent injury, if any. However, its award to the wife might indicate that it believed she had fully recovered and that she could have returned to work before the trial.

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[1] Herein referred to as plaintiff unless otherwise noted.

There was a conflict in the medical testimony, even as between plaintiff's doctors. Defendants called but one doctor as to plaintiff's condition resulting from this accident. He is an orthopedist and had examined plaintiff in March, 1946, for claimed injuries in a Greyhound bus accident in October, 1944. She then complained of pain in the lower portion of her back and down into her leg. The x-rays taken of the twelfth thoracic vertebra at that time showed no pathology. He again saw plaintiff about a year following the accident here, at which time he took x-rays, including the twelfth thoracic vertebra, but could find no evidence of injury, nor could he find any such evidence in other x-rays taken by plaintiff's doctors and shown him, in which some of plaintiff's doctors found evidence of fracture. He concluded she was "a faker of her injury." Evidently, the jury did not believe his testimony to the effect that she had not been injured.

Dr. Dozier, a general practitioner, examined plaintiff the night of the injury and he and Dr. Fischer undertook to treat her. He testified that she was still disabled, spending most of her time in bed, experiencing considerable pain, and having improved very little over the past six months. He found a slight compression fracture of the twelfth thoracic vertebra, a condition he did not find in the x-rays shown him taken in 1944. He had been unable to determine from the x-rays whether the fracture was fresh or old, although now he believed it to have been a fresh one. Plaintiff has run a fever at various times ever since her accident, for which the witness and other doctors have been unable to account. The witness could not predict how long the present condition will continue. He found nothing organically wrong with plaintiff's right leg and he found it difficult to answer a question as to what its functional disorder was. He last saw the patient a day or so before the trial and she was in bed complaining of considerable pain.

Dr. Fischer, an orthopedist, was called into consultation by Dr. Dozier. He first saw plaintiff approximately ten days after the accident. He found muscle spasm of the lumbo-sacral musculature and tenderness in the small of the back and in the low back. Although it was a little hard to tell, owing to her having a lot of pain and being upset emotionally, he did not think there was any decrease in the motor power of her legs. She ran a fever while in the hospital, although he was not impressed with it then. It has been an intermittent fever since. He and the other doctors have been unable to uncover its cause. Principally because of her fever, he sent her to Dr. Paul Aglar of the University of California where tests were made and she was studied, but they were unable to find the cause. Because of the pain in her leg he sent her to a neurosurgeon, Dr. Lester Lawrence, who had her admitted to Providence Hospital and they were unable to find the cause. She was studied at Stanford Hospital where they likewise were unable to find the cause. Plaintiff told him that she had previously slipped in a Greyhound bus and had bruised her sacrum which would be just below the point where she now has maximum tenderness. He examined the 1944 x-rays and found no abnormality in the vertebra. He found in the x-rays of the 1947 accident a compression fracture of the twelfth dorsal (thoracic) vertebra. He had seen plaintiff roughly fifteen to twenty times. The patient is still disabled. He felt that she had received a back sprain and that there had been some inprovement but it had been very slow, very discouraging. Without knowing the reason for the fever it is difficult to give an accurate prospect of the future. She will probably continue to improve slowly over a long period, possibly one to three years. She will probably have some permanent residual disability, although it is difficult to say because there are unknown factors. While there is a little irregularity of the inferior and superior surfaces of the twelfth dorsal (thoracic) vertebra shown in the 1944 films, these are quite normal. At the time he first saw plaintiff and the x-rays of her 1947 accident he thought the fracture was an old one. He did not attach much significance to it because it was giving plaintiff no trouble and the pain of which she complained most bitterly was lower down. He thought if it was a compression, it was a mild one and was not giving her much trouble. He put plaintiff into traction although traction is not standard treatment for a compression fracture, because he thought her injury was to the muscles and ligaments of the lumbo-sacral region. The first brace he put on did not cover the twelfth vertebra and was not for support of it. Plaintiff was hospitalized once after falling from stepping on her shoe lace and twisting her back. In a report to Dr. Dozier (July 8, 1948) he stated: "I notice that patient tends to stand more on her right leg than on her left, which is not what one would expect with the right more painful than the left. * * * I feel that patient is making good progress, and will continue to improve over a considerable period of time."

Dr. Aglar in his report to the witness stated, in effect, that because of inability to arrive at a conclusion concerning the cause of plaintiff's disability, he referred the patient to a psychiatrist, Dr. Burke, who in a preliminary interview was unable to make a diagnosis, feeling that he met with considerable resistance. Further investigation had to be terminated because plaintiff refused to allow a sodium amytol interview. Dr. Aglar found no evidence "of any complicating medical disorder" and concluded "that the psychiatric aspects of the illness have not been sufficiently investigated to allow a definite statement to be made regarding that." On one occasion plaintiff was in the hospital for a couple of days for an acute pelvic infection.

Dr. Lawrence, a neuro-surgeon, reported April 17, 1948, that plaintiff stated she was unable to raise her leg and when asked to do so would apparently make no effort to move it. The leg moved without difficulty when she was performing motions in bed, such as rolling over. She had no apparent pain. Films showed some wedging of the twelfth thoracic vertebra and some irregularity of the tenth and eleventh, which appeared to be degenerative changes. No evidence of fracture could be seen. She showed no evidence of organic damage to her nervous system. Disuse of the right leg was entirely on a functional basis. She stated she could feel a light touch when stimulated in the leg with the point of a pin and a pin prick when stimulated with its head. She had no pathological reflexes. "Do not believe that there is any organic basis" for her complaints.

Dr. Fischer felt she had had something organic in the musculo-ligamentous structure, and that she had received a back sprain. On March 10, 1949, he wrote plaintiff a letter in which he said that she had "infectious spondylitis of the non-ankylosing type, which was precipitated by injury" and would "probably be disabled for at least another six months from doing the type of work you were doing at the time of your injury."

Dr. Mensor, an orthopedist, saw plaintiff at Dr. Dozier's request in December, 1948. She was ill, apprehensive, had definite limitation of motion of her spine on examination. The x-rays disclosed a compression deformity, squeezing or wedging of the twelfth thoracic vertebra. He concluded her persistent back symptoms were due to this condition. On examining the 1944 x-rays he found no such condition. The fact that she had worked as a waitress for approximately eighteen months between her former accident and this one would indicate that she had a good back. He had seen plaintiff an average of a couple of times a month. He had suggested the higher body cast for her and then a brace. He has urged her to take it off as much as possible. She has cooperated and has had it off as much as two or three hours at a time, but she claims her symptoms increase and she gets relief by putting it back on. Her back motion is noticeably improved. Her localization of and distribution of pain still persist. If her symptoms keep persisting after the brace has been removed altogether, he would recommend a bone graft operation. For this type of fracture the average case should be healed in about six months and within a year residual symptoms on conservative therapy be pretty well eliminated.

Dr. Sanderson saw plaintiff in 1944 with reference to a low back injury received by her in a Greyhound bus fall. She complained of pain in the lumbo-sacral region of her back. X-rays taken at that time showed no abnormality in the region of the twelfth dorsal vertebra. On examining x-rays taken after the present accident he found a compression fracture of that vertebra. When he saw her in December, 1944, she was practically well except that she had some pain in her back when she moved around. He would not expect that in March, 1946, she would have paralysis of the legs. The average period of disability from this type of fracture is six months to a year.

Defendants called Dr. Barron, a general practitioner, who saw plaintiff in connection with the Greyhound bus injury. The accident happened October 12, 1944, and he first saw plaintiff in March of 1945 and thereafter on seventy-nine occasions until March 2, 1946. The treatment consisted mainly of physiotherapy and analgesic medication. She complained that she staggered and fell on occasions because of weakness of both legs. She complained mainly of pain in the lumbo-sacral region, in both legs, and occasional headaches and dismenorrhea. He never saw her after the conclusion of the Greyhound case. She was pregnant at the time of the fall but Dr. Hansen whom he consulted informed him that she had a fairly normal delivery. X-rays he saw during that period were negative. He diagnosed her condition as a sprain or strain of the low back.

When asked if at any time before this accident she had ever hurt her back plaintiff said that in October, 1944, she had fallen and bruised the end of her spine. She said that she had fully recovered and there was no permanent injury. This referred to her slipping off the steps of a Greyhound bus. In her complaint against the Greyhound she alleged that her injuries were, among others, "severe straining of plaintiff's entire spine; stretching and tearing of plaintiff's internal organs; a severe spraining of plaintiff's sacro-iliac joints;" that she believed her injuries were permanent in nature. In her deposition in that case, taken March 1, 1946, she testified that her back was injured; at times she could not walk as she became numb and kind of paralyzed, staying that way sometimes for an hour or two and happening two or three times a week. Her whole back ached continually. Her back condition was not improving but was worse. She felt "dead inside." She had not been able to do any housework. Dr. Barron, who was treating her, released her the day of the Greyhound trial, March 5, 1946. At that trial she testified that she had hurt her back, her spine up into her neck; that she had pain continually from the accident until the trial, and that her back had not improved any. It pained terribly and was no less since the birth of the child. She was pregnant at the time of the fall and her baby was born in January, 1945. The testimony in the case at bar shows that plaintiff went back to work as a waitress approximately three weeks after the trial of the Greyhound case.

On July 4, 1946, plaintiff ate some glass in her food in a San Francisco restaurant which made her deathly sick and caused her to lose two or three days work. In the complaint against the restaurant, filed November 12, 1946, she alleged that, among others, she had received severe injuries of the stomach and other parts of the alimentary canal, causing a three months miscarriage; that she was rendered sore, sick, and disabled thereby, suffered severe and excruciating pain, and that she believed her injuries were permanent in character. Also she spent four days in a hospital where she received a blood transfusion. She testified in the case at bar that except for a few days she worked for eighteen months prior to a month before the Safeway accident. This would cover the period between the restaurant incident and the filing of her suit against the restaurant four months later. In that complaint she alleged that by reason of the injuries she was unable to work as a waitress or to take care of her household duties because of incapacity. Thus, she was actually working at a time when in that complaint she apparently claimed to be incapacitated from work. In her complaint in this action, filed approximately three months after the accident, plaintiff alleged that in addition to other injuries, she had received damage to the spine and spinal cord with spinal nerve injuries resulting. None of her doctors substantiated this claim. She explained in effect that she could not remember whether she read the various complaints or discussed with the lawyers the injuries to bet set forth therein.

[1, 2] Having in mind that we are required, on the issue of damages, to consider the facts most favorable to defendants, there is substantial evidence upon which the jury could find (as it evidently did) that plaintiff had practically recovered from any injuries received in the accident, and that she grossly exaggerated her present condition, as she evidently exaggerated the injuries received in the Greyhound bus fall and the glass incident. The only testimony concerning present and permanent disability was that of Doctors Dozier and Mensor. Neither was very definite and their prognosis was to considerable extent based on plaintiff's subjective symptoms, which, of course, the jury could (and undoubtedly did) disregard. Plaintiff probably received a compressed fracture. Whether it left any disability or residual conditions depended again upon whether plaintiff's complaints of pain and paralysis were true. Apparently, the treatment which was first given plaintiff for low back sprain delayed her recovery from the fracture. She still has recurrent slight fever, for which none of the doctors, with the exception of Dr. Fischer, could find a cause. Taking the evidence as a whole, there is substantial evidence to support the jury's findings, and to show that the award given was a substantial one for the injuries received. It is a fallacy to assume that the jury believed that plaintiff's loss of wages was as great as she claimed. She received $30 per week wages. She claimed that in addition she received $45 per week in tips. The jury did not have to believe this testimony as to the amount of the tips. Hence, how much was given for loss of wages and how much for the injuries depends upon what credence the jury gave to her testimony, both as to the amount of income she previously had and as to whether she was still suffering as claimed.

Instructions.

[3] 1. Plaintiff contends that in refusing to give certain instructions offered by her, and in giving certain instructions, the court, in effect, required a different degree of proof between past damages and injuries and future damages and injuries; that the court required as to the past, that the injuries and damages need be shown only to be *reasonably certain,* but as to future damage and injuries they must be shown to be *certain.* It is true the court used the expression *reasonably certain* more often in relation to the past situation than it did as to the future, but taking the instructions as a whole it appears that the court used *reasonably certain* and *certain* practically interchangeably, and that the instructions were not such as to give the jury the impression that they were to apply one rule to the past and another to the future. The instructions relative to this subject follow:[2] "You can award the plaintiffs, in case you decide they are entitled to recover only *such actual damages as the evidence shows to a reasonable certainty,* and by a preponderance of the evidence, they have sustained, by reason of the injuries complained of. * * * The law only permits such damages to be awarded in this class of cases as will pecuniarily compensate for the injuries sustained, if any, and *such as are certain to result therefrom in the future.*" An instruction in the usual form for mental suffering stated that a recovery could be had for something in addition to physical pain. It included mental suffering which will vary among other things with "the nature and

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[2] In the interests of space we have omitted portions. However, a reading of the whole of the instructions more forcibly impresses the fact that the hearer would find no distinction as claimed. Emphasis added wherever "certain" or "reasonably certain" is used.

character of their injuries, whether permanent or temporary * * *" "If your verdict is for the plaintiffs, you may award Constance Lemere such damages within the amount named in the complaint, as in your opinion, *will reasonably and fairly compensate her* for the injuries proved to have been sustained, if any, or *certain to result therefrom in the future* and proximately caused by the alleged negligence. In estimating the amount of such damages, if any, you may take into consideration what before the accident was her health and physical condition, the nature, extent, duration and severity of the injuries sustained, if any; their character, whether temporary or permanent; the extent, degree and character of mental and physical pain, anxiety and suffering, if any, *endured or certain to be endured in the future.* You may also take into consideration such sum as will compensate said plaintiff Constance Lemere *reasonably for the loss of earning power occasioned her by the injury in question, and from which she is reasonably certain to suffer in the future.* In fixing this amount you may consider what said plaintiff's health, physical ability, and earning power were before the accident and what they are now, the nature and extent of her injuries, *whether or not they are reasonably certain to be permanent, or if not permanent, the extent of their duration,* all to the end of determining the effect of her injuries, if any, upon her future earning capacity and the present value of the loss so suffered. * * * If you find that Mrs. Lemere was unusually susceptible to injury and damage, that fact alone will not relieve defendant from liability in monetary damages for any, and all, disability and damages resulting to her solely and proximately from defendant's negligence." The court instructed at some length on plaintiff's expectancy of life under the mortality tables. The court instructed concerning plaintiff Albert Lemere's right to recover consequential damages, stating, among other things: "Such consequential damages include compensation for any pecuniary loss sustained by him to date and which he will, *with reasonable certainty,* sustain in the future because of any resulting inability of Constance Lemere to perform the wifely services which she was able to perform before the accident. Mr. Lemere's consequential damages also include the reasonable value of all medical and hospital expenses *reasonably required, both to date, and in the future,* for the care and treatment of any injuries to his wife proximately resulting from the accident."

The court refused plaintiff's instruction 27. This instruction is practically the same as the one given by the court[3] except that where the court's instruction said "mental and physical pain, anxiety and suffering, if any, endured *or certain to be endured* in the future" plaintiff's instruction stated, "mental pain or suffering which you believe from the evidence said plaintiff is reasonably certain to suffer in the future." In the court's instruction on loss of earning power [3] it is stated that the jury could consider in fixing its amount whether plaintiff's injuries were *reasonably* certain to be permanent, while the portion of plaintiff's instruction 27 referring to loss of earning power used other language which did not refer to either reasonable certainty or certainty as to the future, other than as it related back to the first part of the proposed instruction. Plaintiff's instruction 36 in referring to damages for physical pain and mental anguish stated "* * and which she will be reasonably certain to suffer in the future." Instruction 26, concerning future effects and medical testimony, stated: "If, therefore, it satisfactorily appears with reasonable certainty * * * that plaintiff * * * will suffer detriment in the future * * *" such future detriment is an element to be considered in assessing damages.

[4] Interestingly enough, all of the instructions given by the court, those using only the word "certain" and those using the words "reasonably certain," have been held to be correct instructions. Thus, it has been held that an instruction in the words of section 3283 of the Civil Code—

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[3] See instruction quoted above.

"Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future"—is sufficient. Lonnergan v. Stansbury, 164 Cal. 488, 129 P. 770, 772. In that case the instruction stated that the damages must be "reasonably probable." The court said that these words might well be omitted, and, in effect, " 'certain to result in the future' " used instead. See also Bauman v. San Francisco, 42 Cal.App.2d 144, 165, 108 P.2d 989. On the other hand, in Hoy v. Tornich, 199 Cal. 545, at page 555, 250 P. 565, it was held that using the expression "reasonably certain" as to future suffering and damages was proper. To the same effect, Parsell v. San Diego Consol. G. & E. Co., 46 Cal.App.2d 212, 115 P.2d 539. Thus, the instructions given were proper in themselves. If, however, taken together they would sound conflicting or would be confusing to the jury, then they would be improper. Reading them as a whole, we do not believe that the jury would be confused or would draw the conclusion that any different standard of certainty was required as to future conditions or damages from past or present ones.

To recapitulate: The court referred to "actual damages as the evidence shows *to a reasonable certainty*" the plaintiffs have sustained. ("Reasonable" is here applied to the past.) Then, it stated that the law permits such "damages to be awarded" as will "pecuniarily compensate" for the injuries "sustained" and such as are "certain to result" in the future. ("Certain" is here applied to the past and the future.) The jury may award to Constance such damages as will "reasonably and fairly compensate" her for injuries "proved to have been sustained" or "certain to result therefrom in the future * * *" (As to "injuries," this applies the word "certain" to the past and the future. "Reasonably" and "fairly" are here used only in reference to the ascertainment of the "pecuniary" equivalent of those "proved" or "certain" injuries.)

In estimating damages for Constance's "mental and physical pain, anxiety and suffering," the jury was told to consider the extent, degree, and character thereof "endured or certain to be endured in the future." (Here, again, "certain" applied to the past and the future.) As to Constance's loss of earning power, the judge told the jury to consider such sum as would compensate her for the loss of earning power "occasioned" and from which she is "reasonably certain" to suffer in the future. (Here, "certain" applies to the past; "reasonably certain" to the future.) In "fixing this amount," the jury was told they might consider Constance's health, physical ability, and earning power as they were before the accident and what they are now; the nature and extent of her injuries, whether or not they are "reasonably certain" to be permanent, or if not permanent, the extent of their duration. ("Certain" as to the past; "reasonably certain" as to the future.) Albert's consequential damages, the judge told the jury, include *compensation for any pecuniary loss* "sustained by him to date" and which he "will, with reasonable certainty, sustain in the future * * *" ("Certain" as to the past; "reasonably certain" as to the future.) In that connection, the jury was told that Albert's consequential damages included the "reasonable value" of all hospital and medical expenses "reasonably required, both to date, and in the future." (Here, "reasonably" applies to the past and the future, and is applied in a double sense: it is the "reasonable *value*" of those expenses (services) that are "reasonably *required*.")

The court instructed that the jury must not single out any single instruction or portion thereof, but must "consider all the instructions as a whole, and to regard each in the light of all the others." "* * * the charge to the jury must be read in its entirety, each instruction being considered in connection with the others." Westover v. City of Los Angeles, 20 Cal.2d 635, 128 P.2d 350, 351.

2. The court refused plaintiff's instruction 26 which stated, among other things, that in determining what the future effects of the injuries sustained would be,

a doctor is not required to testify that he is reasonably certain that the plaintiff will suffer ill effects in the future, and that all that is required is that from all the evidence, including the expert testimony, it satisfactorily appears that such detriment will occur with reasonable certainty.

Plaintiff's instruction 27, likewise refused, was similar to one of the instructions given by the court except that in reference to future pain and suffering it stated the words "reasonably certain."

Plaintiff's instruction 32, also refused, also dealt with the determination of whether plaintiff's injuries were reasonably certain to result in future detriment. It stated, further, that expert testimony of medical witnesses as to the danger that evil consequences will result in the future is a proper element to be included in assessing damages and that it was for the jury to determine from the expert evidence as to medical probabilities whether detriment is reasonably certain to occur.

Plaintiff's first contention concerning these three instructions is that, if given, they would have avoided the contradiction or confusion which she claims resulted from the use of the two expressions "certain" and "reasonably certain." But, as we have pointed out, taking the instructions as a whole, there was no such confusion or contradiction, and hence there was no error in refusing the instructions. As to instructions 26 and 32, plaintiff contends additionally that their subjects, that of expert testimony, was not included in the instructions given.

The court instructed as follows: "The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound." "If from the evidence in the case and under the instructions you find the issues for the plaintiffs, then in order to enable you to estimate the amount of such damages as you may allow for pain and suffering, it is not necessary that any of the witnesses should have expressed an opinion as to the amount of such damages, if any. You may estimate such damages from the facts and circumstances and evidence and by considering them in connection with your own knowledge and experience in the affairs of life. With regard to pain and suffering the law prescribes no definite measure of damages, but leaves such damages to be fixed by you as your discretion dictates and as under all the circumstances may be just, reasonable and proper, not exceeding the amount prayed for in the complaint."

[5, 6] Taking these instructions with the others given, the subject of the proffered instructions was sufficiently covered, although not in the language offered by plaintiff. "A party is not entitled to have the jury instructed in any particular phraseology, and may not complain on the ground that his requested instructions are refused if the court, of its own motion or otherwise, correctly announces the substance of the law applicable to the case." Luis v. Cavin, 88 Cal.App.2d 107, 115, 198 P.2d 563, 569. As authority for the contention that these instructions should have been given, plaintiff cites Cordiner v. Los Angeles Traction Co., 5 Cal.App. 400, 91 P. 436; Riggs v. Gasser Motors, 22 Cal.App.2d 636, 72 P.2d 172; Bauman v. San Francisco, supra, 42 Cal.App.2d 144, 108 P.2d 989; Ostertag v. Bethlehem Shipbuilding Corp., 65 Cal.App.2d 795, 151 P.2d 647, and Paolini v. City and County of San Francisco, 72 Cal.App.2d 579, 164 P.2d 916. In none of these cases was there any reference to instructions on this subject. In fact, in all except the Cordiner case, the court was discussing, not instructions, but evidence of experts and its effect.

In the Cordiner case, the court discussed expert testimony and its effect, and then stated that many of appellant's authorities related to the form of instructions given for the guidance of the jury where damages for future results of injuries were sought. However, as the form of these instructions was not given, nor was there any other mention of the instructions, the case is not of much value on this question. While probably plaintiff's instructions 26 and 32 correctly state the law, plaintiff has cited no authorities holding that the failure to give such instructions where the court has given other instructions on expert testimony is error.

3. Plaintiff's offered instruction 22 adopted language of Civil Code section 3333 to the effect that the measure of damages would be the amount which would compensate for all the detriment proximately resulting from the injuries involved, whether such damages could have been anticipated or not. Plaintiff's main concern is that while the court may have fully covered the question of detriment, the attention of the jury was not called to the fact that plaintiffs would be entitled to full damages even though defendants could not have anticipated that a person falling over a negligently placed box would be seriously injured. The main portion of the instruction was fully covered by the other instructions given. For example, the court instructed that defendants would be liable, if at all, for "any and all disability and damages resulting from the defendants' negligence."

[7] So far as the portion dealing with non-anticipation is concerned, while the instruction probably should have been given, the failure to give it could not have been prejudicial. The court thoroughly instructed on the elements of damage which could be considered; there was no issue on the question of anticipation, nor even any suggestion that for recovery the results must have been anticipated; therefore the jury could not have been misled on this subject.

[8] 4. As to plaintiff's instruction 30 which was refused, it merely gave a little more detail than the court's instruction on mental suffering. The court's instruction was sufficient.

5. Plaintiff's proposed instruction 33 commented on the fact that the value of the dollar has changed materially from what it formerly was and told the jury that they should have this fact fixed in mind and base their verdict on the value of the dollar at the time of the verdict. Plaintiff contends that by not having this instruction the jury might have assessed damages as of the date of the accident, approximately two years prior. As support for the instruction, plaintiff refers to O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381, and Sim v. Weeks, 7 Cal.App.2d 28, 45 P.2d 350, and other cases. In none of them is such an instruction considered. They are all cases dealing with the right of appellate courts to consider the changed value of the dollar in passing on the adequacy of verdicts. No case has been cited holding that it is error not to give such instruction. We doubt if it is necessary to remind a jury today of the fact of the diminished power of the dollar. Such fact is brought forcibly home to them every time they patronize the meat market, the grocery store, or any other trade mart. Nor is there any reason to assume that the jury would assess damages as of any other date than the one on which they rendered their verdict. Particularly is this so in view of the fact that apparently they allowed the husband medical and hospital expenses down to the date of trial.

[9] Moreover, the court did charge that as to loss of earning power the jury might consider the nature and extent of her injuries, etc., all to the end of determining the effect of her injuries "upon her future earning capacity and the *present* value of the loss so suffered." (Emphasis added.) Again, the court charged that they might estimate damages "by considering them in connection with your own knowledge and experience in the affairs of life." There was no error in not giving this instruction.

As there is no claim of insufficiency of evidence as a matter of law, the only relevancy of the claim of insufficiency of evidence as a matter of fact is on the question of the possible effect of error, if any, in the instructions. The evidence most favorable to defendants shows that there was no such insufficiency.

Moreover, there is not necessarily any inconsistency in the verdicts as to Albert and Constance. They are both consistent with the deduction that the jury believed Constance had fully recovered, and allowed neither anything for future damage. The jury may have allowed the husband all of his out-of-pocket expense to the time of trial on the theory that her exaggeration of her injuries had actually cost him that much, but that both as to her and him, the termination of the lawsuit should terminate the necessity for further expense. They may have felt that although not amounting to a conscious malingering, her exaggeration of her condition would end with the litigation. Reading the instructions as a whole in connection with the evidence of her own doctors, most of whom felt she had recovered (one of them reported "lack of cooperation") there is no justification for the claim that the intermingling of "reasonably certain" and "certain" in the instructions could have influenced the jury in refusing to allow damages for the future.

[10] It might well be pointed out concerning the claim that in fact the verdict was inadequate that the trial court denied a motion for a new trial, thereby passing on the adequacy of the verdict. As said in Brown v. Boehm, 78 Cal.App.2d 595, 603, 178 P.2d 49, 54: "* * * in view of the fact that the trial court who heard and saw the witnesses, and presumably weighed the evidence on the motion for a new trial, was satisfied with the amount of the verdict, * * * every intendment is to be indulged here in support of its action * * *."

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J. concur.

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102 Cal.App.2d 566

PEOPLE v. CRAIN.

Cr. 2677.

District Court of Appeal, First District, Division 1, California.

March 1, 1951.

Rehearing Denied March 16, 1951.
Hearing Denied March 29, 1951.

Leslie Doane Crain was convicted in the Superior Court of the State of California in and for the City and County of San Francisco, Harry J. Neubarth, J., of an attempt to commit abortion, and of conspiracy to commit abortion, and from the judgment and from an order denying the motion of the defendant for a new trial, the defendant appealed. The District Court of Appeal, Wood, J., held that evidence was insufficient to corroborate prosecutrix, and that refusal of the Superior Court on its own motion, to give certain instructions, was prejudicial error.

Judgment and order reversed.

1. Abortion 🔑11

In prosecution of osteopathic physician and surgeon for attempting to commit abortion and for conspiracy to commit abortion, testimony of police officer that when officer found physician in room with prosecutrix, physician refused to answer certain questions on ground that he preferred to have an attorney do the answering for him, was not sufficient to corroborate prosecutrix as required by statute. Pen.Code, §§ 182, 274, 664, 1108.

2. Abortion 🔑11

In prosecution of osteopathic physician and surgeon for attempting to commit abortion and for conspiracy to commit abortion, evidence was insufficient to corroborate testimony of prosecutrix as required by statute. Pen.Code, §§ 182, 274, 664, 1108.

3. Criminal law 🔑824(5), 1173(2)

In prosecution of osteopathic physician and surgeon for attempting to commit abortion and for conspiracy to commit abortion, failure of court, on its own motion, to define extrajudicial admission, to admonish jury to view with caution evidence purporting to relate oral admission of defendant, and to instruct that guilt of defendant could not be established solely by evidence of admission made out of court, that accusatory statements and questions addressed to defendant out of court were not received in evidence to prove their own truth, but only to explain answers and conduct of defendant, that unless accusations were believed by jury to be true, jury should entirely disregard them, that they must separately decide innocence or guilt of defendant and codefendant, that no evidence of act or declaration of alleged conspirator should be considered unless and until a conspiracy as alleged, is proved without aid of such evidence, was reversible error. Pen.Code, §§ 182, 274, 664.

4. Criminal law ⚷1144(14)

Where record on appeal was silent concerning what, if any, instructions were requested by any of the parties, and were given or refused, District Court of Appeal was required to assume, therefore, that none was requested.

5. Criminal law ⚷824(1)

The trial court, even in absence of a request, has duty to instruct jury, as to all rules of law necessarily involved in decision of cause.

6. Criminal law ⚷770(2)

An instruction is necessary if it is vital to a proper consideration of the evidence by the jury.

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Alfred J. Hennessy, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Defendant Crain appeals from the judgment rendered upon a verdict of conviction (1) of an attempt to commit abortion, a violation of sections 664 and 274 of the Penal Code, and (2) of conspiracy to commit abortion, a violation of sections 182 and 274 of that code. He also appeals from the order denying his motion for new trial. Defendant Farrell, tried and convicted of the same offenses with Crain, did not appeal.

Appellant predicates his plea for reversal of the judgment as to each count upon asserted insufficiency of the evidence to support the verdict and upon asserted prejudicial errors of law occurring at the trial.

The first count charged that on or about October 27, 1949, the defendants did willfully, unlawfully and feloniously "attempt to provide, supply, use and employ an instrument and other means upon the person of Dorothy Arriola, a woman, with the willful, unlawful and felonious intent then and there and thereby to procure the miscarriage of the said Dorothy Arriola," said use and employment not being necessary to preserve her life.

This is a charge that defendants violated certain of the provisions of sections 274 and 664 of the Penal Code. Section 274 declares that "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years." Section 664 declares that "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows: * * *."

The gist of this charge, therefore, it that defendants attempted to "use and employ an instrument and other means," with the "intent thereby to procure the miscarriage of" the woman mentioned. It is not necessary to charge or prove that the woman was pregnant. That requirement was amended out of section 274 in 1935.

As to the evidence, appellant claims it is insufficient to prove that appellant attempted to use or employ an instrument or other means "with intent thereby to procure the miscarriage of such woman". He predicates this claim upon the asserted lack of evidence corroborating the testimony of that woman. In this he invokes section 1108 of the Penal Code, which states that "Upon a trial for procuring or attempting to procure an abortion * * * the defendant cannot be convicted upon the testimony of the woman upon * * * whom the offense was committed, unless she is corroborated by other evidence."

Appellant is correct in representing that in this particular case the sufficiency of evidence of the requisite intent does depend upon the sufficiency of such corroboration. The evidence concerning that intent came in directly and principally through the testimony of the prosecutrix, Arriola, and the appellant.

A good deal of Arriola's testimony went in under restrictions which rendered that portion of her testimony inapplicable to the appellant. That portion consisted of conversations she had with defendant Farrell outside the presence of appellant, and went in subject to the limitation that it was hearsay as to appellant and not binding upon him. And when Officer Nelder started to testify concerning a conversation he had with Farrell outside the presence of appellant, the court, at the request of appellant, advised the jury, in these words: "Ladies and gentlemen, when any conversation is had with one defendant outside the presence of the other, the conversation is not binding on the other defendant. It's only binding on the defendant that speaks."

It appears that on the 27th of October, 1949, Arriola, a policewoman, went to the drugstore where Farrell, a pharmacist, was employed, and engaged in a conversation with him about 4 p. m. of that day. Between 6 p. m. and about 9 p. m. of that day she had four telephonic conversations with him, and took a room at a certain hotel.

Testimony of Farrell. Farrell testified that about 5 p. m. of that day he dropped in and saw Crain, who lived in the same building as did Farrell, and asked Crain if he could examine a patient that evening. Crain said that he was moving but thought he could do so. Crain asked about the patient. Farrell told him the patient was a woman and she seemed—she didn't know herself what the trouble was—that she was suffering from suppressed menstruation. He later went to see Crain about 9 o'clock that evening and told Crain that the woman had telephoned Farrell and told him she was at the hotel. He gave Crain a slip of paper with the name "Dorothy Ormond" on it.

Testimony of Crain. Crain was a graduate of the College of Osteopathic Physicians and Surgeons and held a Physician and Surgeon certificate issued to him by the State Board of Osteopathic Examiners authorizing him to use any and all methods in the treatment of diseases, injuries, deformities or other physical or mental conditions of human beings. Crain was a general practitioner; he had been a specialist in proctology. Crain testified that he was acquainted with Farrell, that their apartments were in the same building; that on October 27 he had a conversation with Farrell, who told him a woman had come in to see him and she wanted to see a doctor and had asked if he could see her that evening. Crain said that he was going across the bay and would be back sometime in the evening. Crain asked what kind of a case it was and Farrell replied it was a woman. Crain did not ask anything further as to what her ailments were. Farrell told him it was a pelvic case, some mixed up menstruation, that she was nervous and sick, and Farrell asked if Crain could examine her. When Crain returned to San Francisco Farrell told him where to go. He went to the 16th Street Hotel that evening and arrived a few minutes before 10 o'clock. When he arrived at the hotel he knocked on the door of the room and a woman asked, "Who is it?" He replied, "Dr. Crain." She opened the door very suddenly and he went in. He asked if she were Mrs. Ormond and she replied that she was. He told her that someone told him she wanted to see him. She replied that she had been waiting. He asked her troubles and she replied that she did not feel well and had not menstruated. He asked if she could be pregnant. She said she thought that was her trouble. He replied that he hadn't much time, but could find out in two or three minutes if she were pregnant. To determine her pregnancy he was going to make a bi-manual examination. When in Woodacre he had taken out his gynecological instruments from a footlocker in which they were stored. He described to the jury the examination for pregnancy and explained the use of those instruments. He testified that the catheter was used as a test for pregnancy because it is almost impossible to insert a soft catheter into a nonpregnant uterus; if the woman is pregnant the catheter will enter easily. The instruments he had with him were the usual instruments carried by a doctor who was to examine a woman for menstrual trouble. He said he had no discussion with Arriola regarding a fee. Arriola was curious about the instruments. She asked what a curette was. He pulled one out and showed it to her. He prepared to make the examination, taking instruments out of his brief case and arranging them and putting a spread upon the bed, and asked her if she was ready for the examination. She replied that she had to go to the toilet. She left the room and was gone less than a minute when she returned. She had her purse under her arm and handed him some money. He was astonished because he had not asked for any money. He did not expect a fee, he thought he was doing a favor. At this time a sharp rap came on the door. Arriola opened the door ond Officers Nelder and Vandervort came in. Crain said he could not hand the money back to Arriola because she had moved. He could either have dropped it on the floor or put it in his pocket. He put it in his pocket. He was in the room probably a little more than 10 minutes before the officers came in.

Testimony of Arriola. Arriola, a resident of San Francisco, testified that she was in the hotel room, waiting for a doctor to call. A knock came on the door. She asked, "Who is it?" A voice said, "It's your friend." She opened the door and Crain was there. He was holding a brief case and a large brown paper bag. The bag had a long white pan inside of it. Crain said he had had a fall in the country and had been knocked unconscious. He had gotten the call from Farrell after regaining consciousness. He said that the fall had made him very forgetful; that he had left his bag in another hotel on the third or first floor, he could not remember which. Arriola said she hoped he would not forget where he left her, and asked if he was going to come back and care for her. He said it probably would not be necessary, but if it should be, she could call Farrell and he would come over again. He said he was going to see a doctor about the fall. She asked him about the room, if it was adequate. He said it was not very good, the walls were thin and she could not scream all she wanted to. Crain took the pan out of the bag and put it on the table. Then he opened the brief case and took certain surgical instruments out, a vaginal speculum, and a tenaculum, and he took out a rubber tube which he called a catheter, and a line, and a tube of what he said was sulphathiazole. He said he would not be able to perform the operation which she expected he would, because he was in a hurry. She said she hadn't expected any particular operation, that she was just given to understand that something would be done which would produce a miscarriage. He said that normally he used a curette, and took an instrument from his bag which had a little hook on the end of it, and said that was a curette. He said that took 45 minutes, possibly an hour, and he wouldn't have time enough for that, that he would use a catheter. He tied some string to the catheter. He said he normally used nylon string which was very strong, but it dropped from his pocket when he suffered the fall, so he said this string was fish line and he had boiled it 30 minutes so it was very clean. He said he would squeeze some sulphathiazole into the end of the catheter, which he did, and would make it antiseptic, and that he would insert the catheter into the cervix and that it would curl up within the cervix and the fish line would be left exposed externally, and that she should from time to time pull on the fish line, and that she would be unable to remove it until such time as an abortion would be produced. She asked how long that usually took. He said sometimes as little as 8 hours, sometimes as many as 24, and in some cases it's not successful at all. So she asked him whether this would be very painful, if there was anything he could do to alleviate pain. He said, yes, it would produce severe cramps but that she could probably take care of herself. He said that if the pain became unbearable the next day she could call Farrell and he could get in touch with Crain and he would come over and give her a shot of morphine. She said, "Well, what about my meals? Will I be able to get up and get my meals?" He said, "You won't feel like eating." Crain was trembling a great deal. She asked him if he felt capable of performing the operation since he had the concussion. He said, "Oh, yes," he was sure it would be all right. She asked whether he thought it was a safe operation and he said, "Oh, yes," it was just as much to his interest for it to be safe as it was hers. She asked whether he felt he had performed the operation sufficiently enough so that there would be no danger, and he said, "More than I would care to admit," or words to that effect. She asked him if he were a doctor. He said, yes, he was. He placed a large plastic sheet over the corner of the bed. He unfolded it and laid it over the edge of the bed. He had a light extension, with a small lighter band on it, and connected it to the socket that was in the ceiling. She asked how he was going to sterilize the instruments. He said he had some Lysol and would sterilize the instruments with that, and would use the Lysol internally as well. He also said he would use sterile gauze internally. She took some money with her into that room—$300 which she had gotten from Inspectors Nelder and Vandervort. She took the money out of her purse and threw it on the bed. It was actually $295. Crain picked it up and said he was in a big hurry, so wouldn't take the time to count it; put it in his left pocket. Crain went over to the wash stand, ran some water in the pan, went over to the nightstand, and was putting the sulphathiazole in the catheter. A knock came on the door and she opened it to Inspectors Vandervort and Nelder. They entered.

Upon cross-examination, Arriola said she was not pregnant; she was not asking anyone to abort her; she was carrying out police orders; she had no arrangements to perform an abortion when she went to the hotel. She said Crain never asked her to undress; he was not going to do these activities; she was not going to let him touch her body. There was no agreement about $300; she had no arrangement with Crain about $300, no agreement to give him $300, no agreement whatever with him. She did not know Crain, had never seen him or conversed with him before he came into that room. During her conversation with Crain she did say she would like to leave to go to the ladies' room but did not do so, he was ready to perform. She had arrangements with the police officers that they were to come to the room where she was within 8 or 10 minutes after the doctor's arrival; she was to converse with the doctor for 10 minutes; then the officers were to come and knock on the door and she was to open the door, which she did.

The corroborative evidence. Certain exhibits were introduced in evidence and certain testimony was given as tending to corroborate the testimony of Arriola.

The Exhibits included a brief case, a paper bag (which had contained a pan), a number of surgical instruments, a rubber catheter with a string attached, and a light and extension cord, which the officers found in the hotel room where the conversation between Arriola and appellant took place; also a slip of paper and an envelope, which they found upon the person of appellant. The slip of paper bore the words and figures "Dorothy Ormand Room 211, 16th Street Hotel." The envelope bore the name and address of defendant Farrell and had written upon it, "Opal Jackson, 16th Street Hotel Room 211," and a telephone number.

The keeper of the hotel testified that in October he registered a person by the name of Opal Jackson; that on the 21st she rented a room for a week and checked out on the 23rd; room 211, the room which Arriola rented on the 27th of that month, under the name Dorothy Norman, registering from Corte Madera.

A physician and surgeon, testifying on behalf of the respondent, explained the uses to which Crain's instruments were severally adapted, some for operations and some for examination of a patient, and testified that some of them any doctor would have, and some were particularly used for the practice of gynecology, which he described as treatment of the diseases of women, adding that all of the instruments could be used for the purpose of examination of a patient; that a doctor would have to have a curette to be fully equipped to carry on his profession properly, also a vaginal speculum; that a doctor would not be fully equipped to carry on his profession, if he treats women, unless he had the instruments which the witness saw before him; that the catheter in evidence was a soft catheter; that it is not accepted procedure to perform an abortion with a soft catheter but it can be done. He further testified that it would be difficult to put a catheter through the cervix of a nonpregnant woman, and the attempt to do so might serve as a test for pregnancy; he had never used that particular test but he would not say that that method would not serve as a test. He stated that during pregnancy the cervix is usually slightly enlarged and softer and tends to take on a change of color, and that the doctor would use the vaginal speculum and the lamp to observe such changes, or the lack thereof, and if he observed such changes he would suspect that the woman was pregnant; also that the introduction of a soft catheter, if it entered, might be confirmatory evidence of pregnancy. He again stated that all of the instruments in evidence and the head-lamp are standard instruments which any doctor who might examine and treat women might have on his shelves.

Inspector Nelder testified that about 8:40 p.m. of October 27, 1949, he saw Arriola enter the 16th Street Hotel. About 15 minutes later she came out, and a little later she reentered the hotel. About 9:30 p.m. he observed a gentleman, carrying a black valise or brief case and a brown bag resembling the paper bag in evidence, enter the hotel. Nelder and Inspector Vandervort entered the hotel about 5 minutes later, went upstairs to the second floor, to room 211, where they stood outside of the room and listened. Nelder was able to hear a man's voice and a woman's voice, although he could not distinguish what they were saying. He heard a clanging sound, such as metal against metal, and a water faucet go on and off; that is all he heard. He knocked at the door and Arriola opened it, and the two officers entered. When they entered, Arriola was sitting in a chair to the right of the door and at the foot of a bed. Appellant was standing between the bed and the wall, near a small table. He was merely standing there, he looking at Nelder and Nelder at him. The brief case was on top of the bureau, unstrapped, and contained the miscellaneous items which it now contains. This paper bag was on top of the bureau near the brief case. The rubber catheter was on the small table; it had the string attached to it as it is now. The pan, including 5 instruments and a tube, were also on the table in the room. The plastic mat was spread out on the bed. The light and cord were attached to a socket and the light was burning when he entered the room.

Upon entering the room Nelder had a conversation with appellant. He asked him where the money was that he received for the abortion that he was to perform and he said, "I didn't receive any money." Nelder said, "Yes, you did, where is it?" "All right then," he said, "it is in my left rear pocket." Nelder removed $295 currency from appellant's left rear pocket, and said he would have to check the serial numbers against the numbers on a piece of paper he had. Appellant and Nelder sat down on the bed and checked those numbers. Nelder searched the person of appellant. Nelder took from Crain's person at that time the slip of paper with the name "Dorothy Ormond" on it, and the envelope addressed to Farrell. Nelder asked appellant how long he had been doing abortions in San Francisco. He remained silent; he did not answer. Then Nelder asked him how he was going to perform this abortion, and he remained silent. Nelder repeated the question, asking how he was going to perform this abortion, and appellant said he was not going to commit an abortion; said he was going to "commit an examination." Nelder pointed to the catheter and said, "Well, you weren't going to use this to do an examination, were you?" and he did not answer. Then Nelder said, "You don't charge $295.00 for an examination, do you?" and he said, "Well, I'm not going to answer any more questions," saying "I want an attorney." Nelder asked him if he was reluctant to talk about it and he said he would rather not talk about it. Nelder asked him where he had gotten the slip of paper and he said, "Oh, some poor fellow, some crackpot gave it to me." Nelder said, "Isn't it a fact that Bill Farrell gave you this?" and he replied, "No, Bill Farrell did not give it to me." Nelder asked him what time he got the piece of paper and he said, "Around 8:00 o'clock"; then Nelder said he couldn't have gotten it around 8:00 because Arriola did not get this room until 8:40 or 8:45. Appellant sat a while and he said, "Oh, it must have been a little after 9:00 o'clock." Asked if he knew Bill Farrell, appellant said he did. Asked if all of those instruments belonged to him, appellant said they did. The officers, Crain, and Arriola then went to Farrell's apartment, Nelder and Arriola in one car, Vandervort and appellant in another. Nelder had a conversation with Farrell before appellant arrived. As these four and Farrell were leaving, Nelder said to appellant, "Do you know Bill Farrell?" He said he did. Nelder said, "Is this Bill Farrell?" He said, "Yes, it is."

On cross-examination, Nelder testified that he arrived in front of the door of room 211 at 9:46, and stood there 7 or 8 minutes. When he entered the room he rushed up to appellant and said, "Where is the money you received for an abortion you were going to perform?" Up to that time he had not discussed anything about an abortion with appellant. He was assuming that an abortion was going to be performed. Also, at that time he assumed appellant had the money. Arriola got the money from the officers prior to that time. Nelder said he did not ask appellant to make any written statement for him and sign it, that appellant said he did not want to answer any more questions, and asked for an attorney. Asked if appellant denied all of his questions, Nelder answered, "Principally he did." When asked about the money, appellant at first denied he had the money; about performing any abortion, appellant denied it. Nelder could not say that at that time he knew appellant had not performed an abortion in that room; he realized that Arriola was not going to have an abortion performed, for he had instructed her not to be touched, had volunteered that statement to her. Asked if appellant did not tell him he did not desire to be cross-examined by Nelder, that he wanted an attorney, Nelder replied, "He said he didn't want to answer any more questions, he wanted his attorney, yes, sir." Asked if that was appellant's privilege, Nelder responded, "He was granted that privilege." Asked if when he came into the room and asked for the money, Arriola told him where it was, he said, "No," adding, "Dr. Crain told me where it was," and "I don't remember her telling me where it was."

Arriola testified that as the officers came in Crain had his back to the door; that she was expecting them, that they were overdue. She remembered the officers grabbing Crain. She said it was she who told the officers that Crain had put the money in his left-hand pocket.

Appellant testified: I was astonished when Arriola handed me some money; I had not expected a fee, thought I was doing a favor. At that time there came a sharp rap on the door. Arriola jumped up and opened it, and Nelder and Vandervort came in, and in the meantime I was—just reflexly—I had the choice, I couldn't hand the money back to her because she moved; I couldn't drop it on the floor, and I put it in my pocket. The officers approached me. Mr. Nelder, I believe it was, took me by the coat lapels and said, "Where's the money?" "Where's that money?" I said "What money?" He said, "That money you got for—for the abortion you're going to do." I said, "Abortion? What abortion?" and Mrs. Arriola said, "Oh, it's in his pocket, in his rear—in his left pocket." He took the money from me, put his hand in my pocket and took it, whatever was in my pocket, and there it was, the money. It all happened so quickly. Next, I believe it was Nelder who asked me what all those instruments were for, and I said, "Well, I was intending to examine this lady." And it wasn't until that time that I realized that they were police officers. I thought when they entered the room that it was either the owner of the room or perhaps a badger game, and maybe it might be her husband. I am not used to examining women without a nurse around. I was a little confused. Nelder asked me some questions. I did not refuse to answer any of them. I answered his questions. When I found what he was driving at, I refused to answer his questions. As soon as I got it through my head he was accusing me of doing an abortion with those particular instruments I had there, I think I stated to him I preferred to have an attorney do my talking for me. Up until then I did not remain silent and refuse to answer his questions. Later, Nelder asked me to sit down on the bed and help him copy off the serial numbers. He checked them off, and took me away from there sometime later. He took me to the apartment where I lived and where Mr. Farrell lived. He asked me if I knew Farrell and I said, "Yes." On the way over to the apartment I rode alone with Officer Vandervort. They did not take me to my apartment. We went to Farrell's.

As to the slip of paper with the name Dorothy Ormond on it, and the envelope addressed to Farrell, appellant testified: I received each from Farrell at the same time. There was a discrepancy in the name on the envelope, and Farrell said to me, "I guess that's the girl friend [of Arriola]." I don't know of any reason for writing a telephone number down. Farrell offered some explanation of it. It seems to me that if I had to call—that Arriola—I didn't know her by that name at that time—would not be known there, so I had this woman's name that was supposed to be registered there, this slip with the name Dorothy Ormond written on it. Farrell gave me that at the same time. I did not ask him why he wrote all of the information down twice. I did not at any time ask who Opal Jackson was. I did not go to see her.

This "other evidence" seems as corroborative of the testimony of Crain as of the testimony of Arriola. The instruments he had and was planning to use were such as any doctor might have, standard for a physician engaged in treating the diseases of women. The catheter which he had made ready could be used either in testing for pregnancy or in attempting to bring about a miscarriage. He was a licensed physician and surgeon and as such had the right to possess the instruments in question.

The slip of paper with the name "Dorothy Ormond" on it seems innocuous, given Crain by Farrell as the name of the person wishing to see a doctor, a name very like "Dorothy Norman" under which Arriola registered at the hotel. The significance of the name "Opal Jackson" on the envelope in Crain's possession, and the fact that someone of that name registered at the hotel a few days before, is purely speculative.

The fact that Crain had the money in his possession also supports his testimony as much as it does that of Arriola, and is as consistent with innocence as it is with guilt, especially in view of her testimony that she had no arrangement or discussion with him concerning money or a fee.

[1, 2] The evidence concerning his conduct and responses to the officer's accusatory statements and questions is in the same category. There was the element of surprise when the officers entered the room. He was unaware, at first, as to their identity and what it was all about. That was followed by definite nonincriminating responses, and then he refused to answer further because he preferred to have an attorney do the answering for him, as was his right. This is the weakest kind of "corroboration," if it may be called such. We consider that at most it raises a mere suspicion of guilt, falls short of evidence tending to connect Crain with the commission of the alleged offense. And proof of the commission of that offense, in this case, depends upon corroboration of the woman's testimony, which corroboration is lacking.

This case, upon its facts, is very similar to People v. Murphy, 60 Cal.App.2d 762, 141 P.2d 755, where the charge was that defendant used an instrument upon the person of a certain woman with intent to produce a miscarriage. He was convicted and appealed. The record showed a conflict between his testimony and that of the woman. He vigorously contended that no condition of pregnancy existed in the prosecutrix and that he did not treat her for any such condition; that he treated her for a polyp condition. He was a licensed physician and surgeon. The sufficiency of the evidence depended upon corroborating evidence. Certain surgical instruments belonging to the defendant were introduced in evidence. Defendant had a conversation with a police officer which defendant admitted having, and testified that the instruments in evidence were such as are found in the office of any physician specializing in that branch of medicine to which he devoted his efforts. Asked by an officer if he understood they were investigating reports that he had been doing abortions, defendant said, "Yes." Asked if he would show them the "instruments and medicines that you use in performing these abortions," he said, "I will." A doctor who examined the prosecutrix after the event charged, said that her condition could have resulted from a number of various causes and that he was unable to say which was the cause. Admissions and a confession made by his codefendant were admitted in evidence, limited to the defendant who made them, not applicable to this defendant.

Of the corroborative character of such evidence, the reviewing court in the Murphy case said: "In whatever light the corroborative evidence in this case is viewed, nevertheless, in order to give it effect, even as tending in that direction, it is necessary at every point to interpret and explain the 'corroborative circumstances' in the light of the testimony of the prosecutrix. Before it can be said to connect the defendant Murphy with the commission of the crime charged against him, recourse must be had to the testimony of the prosecutrix. And, though we may concede that such corroborative evidence arouses a suspicion, even a grave suspicion, nevertheless that it is not sufficient to establish the corroboration required by law. Furthermore, when viewed without recourse to the testimony of the prosecutrix, the 'corroborative circumstances' standing alone, while they may be said to generate a suspicion of guilt, are as compatible with innocence as they are with guilt of the crime denounced by section 274 of the Penal Code. Hence, the corpus delicti of the crime charged herein was not proven. People v. Gilbert, 30 Cal.App.2d 321, 323, 86 P.2d 135; People v. Braun, 31 Cal.App.2d 593, 602, 88 P.2d 728; People v. Davis, 210 Cal. 540, 555, 293 P. 32. Unless the 'corroboration' furnishes inculpatory evidence that is, evidence tending to connect the defendant with the offense, then there is no legal and sufficient corroboration. People v. Morton, 139 Cal. 719, 724, 73 P. 609." 60 Cal.App.2d at page 772, 141 P.2d at page 761. Respondent criticizes the Murphy decision and claims that People v. Ramsey, 83 Cal.App.2d 707, 189 P.2d 802, correctly holds that the sufficiency of the "other evidence" to corroborate rests wholly with the triers of fact. There is language in the Ramsey case that might be so interpreted if read outside the context of the facts there presented. The defendant therein did not take the stand, did not controvert the prosecutrix's testimony. The defendant's possession of instruments and drugs suitable for use in producing an abortion was not innocuous, because she was not licensed to practice medicine and surgery. A medical expert who examined the woman within about an hour after the alleged operation and while she was still at the defendant's premises, testified that his impression was, at that time, that this was a pregnant uterus of approximately six weeks, and that there was some bleeding, suggesting that she was possibly threatening to abort or could already have aborted; and that about two weeks later he again examined her and found that her uterus was about half the size it was at the time of his first examination. In addition, two officers testified that on the day on which the offense was alleged to have taken place they had conversations with the defendant in which she made definitely self-incriminating statements. See 83 Cal. App.2d at pages 713–714, 189 P.2d 802. That was "other evidence" which, standing alone, without recourse to the testimony of the prosecutrix, tended to connect the defendant with the commission of the crime charged against her. The weighing of that evidence was properly the function of the jury, not that of the reviewing court. Accordingly, the requirement that the "other evidence" must, without recourse to the testimony of the prosecutrix, tend to connect the defendant with the offense (not merely generate a suspicion of guilt), was met and satisfied by the corroborative evidence in the Ramsey case but not in the Murphy case. That, as we see it, is the basic difference between the two cases. It reconciles the affirmance of the judgment of conviction in one and the reversal in the other. In People v. Malone, 82 Cal.App.2d 54 at page 59, 185 P.2d 870 at page 873, in commenting on the Murphy case, the court said, "All that the Murphy case holds, as we read it, is that the corroborative evidence did no more than 'generate a suspicion of guilt' and that it was, therefore, insufficient." In People v. Wilson, 25 Cal.2d 341, at page 347, 153 P.2d 720 at page 723, the Supreme Court expressed the rule in these words: "So long as corroborating evidence creates more than a suspicion of guilt, it is sufficient even though it 'be slight and, when standing by itself, entitled to but little consideration.' [Citing cases.]"

[3] We do not rest our decision in the instant case solely on the ground that the "other evidence" did no more than generate a suspicion of guilt. Its consideration was given the jury without adequate instruction. The jury received from the court no definition of an extrajudicial admission; no admonition to view with caution evidence that purports to relate an oral admission of a defendant; no information that the guilt of a defendant cannot be established solely by evidence of an admission made out of court; and no instruction that accusatory statements and questions addressed to a defendant out of court are not received in evidence to prove their own truth, but only to explain the answers and the conduct of the defendant in the face thereof, and that, unless the jury find that such answers and conduct at the time indicated admission of the truth of such accusations, the jury should entirely disregard such accusations. Nor were they told that they must separately decide the question of the innocence or guilt of each of the defendants. In respect to the conspiracy charge, they were not told that each defendant was individually entitled to and must receive the jury's determination whether or not he was a member of the alleged conspiracy, if any existed, and that no evidence of an act or declaration of an alleged conspirator may be considered against another alleged conspirator unless and until, without the aid of such evidence, a conspiracy as alleged, with both such persons members, has been proved to have been in existence at the time of such act or declaration. Although the court gave instructions on the law relating to attempt to commit abortion and conspiracy to commit abortion which were correct as far as they went as statements of general principles of law (similar to instructions described and criticized in the Murphy case, 60 Cal.App.2d, at page 773, 141 P.2d 755, they were incomplete and inadequate as statements of the law applicable to the facts of this case, because of the omissions we have noted. These omissions are of the greater significance because of testimony received of certain extrajudicial statements made by defendant Farrell in the absence of appellant, and of the testimony of the prosecutrix concerning her conversations with Farrell outside the presence of appellant. Although during the course of the trial the court did admonish the jury that any conversation with one defendant outside the presence of the other "is not binding on the other defendant," we find in the instructions given at the conclusion of the trial no admonition, when considering the case for or against one defendant, to disregard

completely any evidence that was admitted only as to the other defendant. We are not prepared to say that the omission of such an admonition was error in the absence of a request by appellant for an instruction on that point, but it is an added circumstance. We cannot say that appellant was not prejudiced by the errors mentioned. The jury well might have reached a different verdict had they been fully and adequately instructed.

[4–6] We should state that the record upon this appeal is silent concerning what, if any, instructions were requested by any of the parties, and given or refused. We must assume, therefore, that none were requested. Rule 52, Rules on Appeal. However, the trial court, even in the absence of a request, has the duty to instruct the jury, as to all rules of law that are necessarily involved in a decision of the cause. Thus, "An instruction is necessary if it is vital to a proper consideration of the evidence by the jury. [Citing cases.] Accordingly, it has been held that the court must of its own motion instruct the jury in criminal cases with respect to accomplices and their testimony [citing cases], corroborative evidence in cases involving the obtaining of property by false pretenses", and "admission of confessions and the necessity of independent proof of the corpus delicti", among others. People v. Putnam, 20 Cal. 2d 885, 890, 129 P.2d 367, 370. See, also, People v. Hamilton, 33 Cal.2d 45, 50–51, 198 P.2d 873. The instructions and admonitions which we hold were erroneously omitted in the instant case are in that category.

The observations which we have made concerning the insufficiency of the evidence to support the conviction of an attempt to commit an abortion, and the inadequacy of the instructions, apply also to the insufficiency of the evidence to support the conviction of conspiracy to commit abortion, and the inadequacy of the instructions applicable thereto.

The judgment and the order appealed from are reversed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.

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102 Cal.App.2d 743

DIERSSEN v. SZMIDT.

Civ. 4080.

District Court of Appeal, Fourth District, California.

March 8, 1951.

Hearing Denied May 3, 1951.

Action to quiet title by Mina Ring Dierssen, formerly Mina Ring Maracci against R. G. Szmidt. The Superior Court of Fresno County, Arthur C. Shepard, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Griffin, acting P. J., held that where plaintiff's predecessor acquired tax title in 1937 and quiet title action was instituted in 1945, statute barring commencement of any action or maintaining any defense in an action based on alleged invalidity or irregularity in tax sale proceedings six months after date of execution of deed barred defendant from attacking tax deed based on alleged lack of jurisdiction.

Judgment affirmed.

1. Taxation ⚷805(3)

Where there was no showing that original owner was in possession of realty sold to state for nonpayment of taxes, and tax deed attacked by defendant owner was executed to plaintiff's predecessor in 1937, defendant was barred by six month statute of limitation from attacking regularity of tax sale proceedings on jurisdictional grounds in quiet title action brought by plaintiff in 1945. Pol.Code, § 3897(8), as amended by St.1935, p. 1441; Revenue and Taxation Code, §§ 3725, 3726.

2. Taxation ⚷805(3)

Statute providing that no action can be maintained to question validity of tax sale proceeding unless same should have been commenced within six months after date of execution of deed from tax collector does not apply where original owner was in possession of property. Pol. Code, § 3897(8), as amended by St.1935, p. 1441; Revenue and Taxation Code, §§ 3725, 3726.

3. Statutes ⚷121(7)

Where general purpose of original statute was in respect to sale of tax deeded property, any additional rights or limitation of rights of parties dealing thereunder conferred by amendment did not treat of new subject and therefore a reference in title of amendatory statute to general subject and to number of code section amended was sufficient compliance with constitutional provision that subject of statute be stated in title, and amendatory statute was not unconstitutional for failure to contain in its title a limitation not contained in original statute. Pol. Code. §§ 3897, 3897 (8), as amended by St.1935, pp. 1437, 1441; Const. art. 4, § 24.

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Henry O. Wackerbarth, Los Angeles, for appellant.

Thompson & Thompson, Fresno, for respondent.

GRIFFIN, Acting Presiding Justice.

Action to quiet title. Defendant appeals from a judgment quieting plaintiff's title to certain lots acquired by tax sale near Coalinga. Plaintiff is successor in interest of the tax-title purchaser. Defendant was the original owner and acquired title thereto in 1921.

The facts are not in dispute. On June 25, 1925, the property was sold to the State for nonpayment of 1924 taxes. It was deeded to the State on June 30, 1930. On October 8, 1937, application was filed to sell the property at public auction. The sale proceedings were started. Notice of sale was published on December 3, 1937, and stated that the sale would be held on December 28. On December 10, the County Tax Collector mailed to defendant at "724 South Los Angeles Street, Los Angeles, California" (the address of defendant shown on the assessment roll) with postage prepaid, and by registered mail, a copy of the published notice. The envelope bore an endorsement: "Return Receipt Requested", and the endorsement that after 30 days the letter was to be returned to the County Tax Collector at Fresno. It bore the postmarks as having been mailed on December 10, 1937, and arriving in Los Angeles on December 11, and on January 11, 1938, it was mailed back to Fresno from Los Angeles, arriving at Fresno on January 12. It bore the post-office endorsement: "Return to writer unclaimed", "Unknown".

At all times since 1921 the property was assessed to R. G. Szmidt. Defendant resided in Fresno until 1923. She then moved to the above address in Los Angeles, where she was in business. In 1924, she sold that business and moved away. She states she received some mail at that address which was forwarded to her by the occupant of the premises. She testified she did not receive the notice of sale mailed by the Fresno County Tax Collector and had no knowledge of the sale until July, 1939. Defendant paid no taxes on the property subsequent to the year 1923. Prior to July 19, 1938, plaintiff entered into an oil-drilling lease involving the lots in dispute with one Terry. Thereafter, defendant entered into a similar lease with him. No physical occupancy of the unenclosed property was ever effected by any of the parties or the lessee.

Defendant was allowed to amend her answer and in addition to denying plaintiff's title, set up a claimed defense that the action of plaintiff was barred by the provisions of sec. 3897, subd. (8) of the Political Code, and secs. 3725 and 3726 of the Revenue and Taxation Code. The deed from the tax collector to plaintiff's predecessor in interest was dated December 29, 1937, and recorded January 3, 1938. The instant action was filed November 9, 1945.

The main defect in the tax sale upon which defendant relies for a reversal of the judgment is that a copy of the published notice of sale was not mailed to the last assessed owner 21 days before the sale or within five days after the publication of such notice, as required by former section 3897 of the Political Code. Stats. 1921, chap. 300, p. 400, now carried in Revenue and Taxation Code, Chap. 7, part 6, Div. 1. Counsel for plaintiff admits that the notice was mailed seven days after publication, instead of the five-day provision set forth in that section, and admits that said notice was mailed 18 days before the sale, but argues, and the court found that the curative acts, enacted since the tax sale, fully validated any alleged defects in the tax sale. Defendant seeks to avoid the application of these validating acts by asserting that the errors here complained of were jurisdictional in character, involved due process, and accordingly could not be thus cured.

Section 3897 of the Political Code was amended, Stats. 1935, chap. 396, p. 1441, in effect July 6, 1935. It read, at the time of the tax sale in 1937, that notice of sale must be published or posted not less than three weeks prior to the sale and a copy of the notice of sale must be mailed within five days after the publication. The requirement of mailing by registered mail was omitted. It further provided that the deed of the tax collector "shall be prima facie evidence of the regularity of all proceedings from the assessment of the assessor to and including the execution of such deed"; and provided in subdivision (8) that no action could be maintained to question the validity of any proceeding unless the same should have been commenced within *six months* after the date of the execution of the deed of the tax collector, "and thereafter all persons shall be barred from commencing or prosecuting any such action or maintaining any defense in any action based upon the alleged invalidity or alleged irregularity in such proceedings". Bray v. Jones, 20 Cal.2d 858, 129 P.2d 357, definitely holds that the legislature has full control over the sale of property belonging to the State, and may at any time regulate the method of its disposition, and that a sale by the State of property sold to it for delinquent taxes is governed by the law as it stands *at the time of the sale by the State.* It would appear, therefore, that section 3897 of the Political Code, as amended in 1935, was the statute to be here applied since defendant is not claiming any defect in the sale to the State.

Defendant cites 37 Cyc. 1379–1380, wherein it is said: "Failure to give the owner of the property the requisite notice of * * * the sale * * * is a jurisdictional defect and not one which can be cured," and also cites such cases as Jones v. Walker, 47 Cal.App.2d 566, 118 P.2d 299; Hall v. Chamberlain, 31 Cal.2d 673, 192 P.2d 759; Warden v. Broome, 9 Cal.App. 172, 98 P. 252; Bernhard v. Wall, 184 Cal. 612, 194 P. 1040; and Dougery v. Bettencourt, 214 Cal. 455, 6 P.2d 499, in support of this statement.

Tannhauser v. Adams, Cal.App., 182 P. 2d 280, was a case which this court had before it involving a similar question. We there believed that where the delinquent tax list and notice of taxes due was published, a taxpayer could not complain that he was denied due process of law on the ground that the tax collector failed to mail the notice of sale by registered mail to his last known post-office address as required by statute since the publication was sufficient notice in and of itself to satisfy due process of law, and that since the additional requirement that the tax collector mail a notice to the last known post-office address of the assessee was a legislative act, the curative clause would cure anything which the legislature could have omitted in the first instance. There is considerable authority opposed to this contention. Black on Tax Titles, § 205, p. 255; § 206, p. 256; § 210, p. 264; § 484, p.619; Teater v. Johnson, 95 Cal.App. 182, 185, 272 P. 313; Joslin v. Shaffer, 66 Cal.App. 69, 225 P. 307; and other authorities cited by defendant. This court also held in that same action that the statute of limitations, Revenue and Taxation Code § 3521, ran against the property owner seeking to quiet title against the tax deed holder. A hearing was granted by the Supreme Court and it, in Tannhauser v. Adams, 31 Cal.2d 169, at page 171, 187 P.2d 716, at page 718, 5 A.L.R.2d 1015, sustained the last holding but as to the first holding it said: "We are of the view, however, that although such a failure has on occasion been termed a 'jurisdictional' defect, a delinquent taxpayer's right to raise it may, at least under the circumstances shown in this case, be terminated by limitation statutes. Consequently it becomes unnecessary to here consider the scope and constitutionally permissible effect of the curative acts."

It is defendant's argument that no statute of limitations operates against him and that section 3897, subd. (8), Stats. 1935, chap. 396, p. 1441, does not bar an owner from defending a quiet title action brought by a tax-title purchaser, and if so it is unconstitutional; that secs. 3725 and 3726 of the Revenue and Taxation Code, which provide: "3725 * * *. A proceeding based on alleged invalidity or irregularity of any proceedings instituted under this chapter can only be commenced within one year after the date of execution of the tax collector's deed", and "§ 3726 * * *. A defense based on the alleged invalidity or irregularity of any proceeding instituted under this chapter can be maintained only in a proceeding commenced within one year after the date of execution of the tax collector's deed", are not applicable because the instant proceedings were not instituted under chap. 7, part 6, division 1 of the Revenue and Taxation Code; that sec. 175 of the Revenue and Taxation Code, Stats. 1945, chap. 1017, p. 1963, effective Sept. 15, 1945, which provides that tax deeds to the State "shall be conclusively presumed to be valid unless held to be invalid in an appropriate proceeding in a court of competent jurisdiction to determine the validity of said deed commenced within one year after the execution of said deed, or within one year after the effective date of this section, whichever be later", is not applicable because this action was brought within one year from the date that section became effective, citing Clark v. Duncanson, 79 Okl. 180, 192 P. 806, 16 A.L.R. 315.

We see no reason why the limitation provisions of section 3897 subd. (8), as amended, Stats. 1935, chap 396, p. 1441, are not applicable, unless under the decision of McCaslin v. Hamblen, [Oct. 1950] Cal. App., 223 P.2d 326 [Hearing granted S.Ct.] the owner was in actual or constructive possession of the lots and the limitation statute would not apply as to such owner. See, also, Tannhauser v. Adams, 31 Cal.2d 169, 187 P.2d 716, 5 A.L.R.2d 1015.

Under the issues and evidence here presented neither party was in actual possession in the "usual sense", nor were they in such possession as might preclude the operation of such a statute of limitations. Union Title Ins. & Trust Co. v. Thorp, 94 Cal. App.2d 421, 424, 210 P.2d 905.

Had defendant instituted this action to quiet title to the property against the plaintiff in 1945, eight years after the tax collector's deed in question was executed, predicated upon the claim that the tax deed was void, it would appear that she would be barred under the provisions of that section from maintaining such an action. The pertinent provisions of former section 3897 of the Political Code, as amended, were carried into Chapter 7, Part 6, Div. 1 of the Revenue and Taxation Code, which chapter, as well as the proceedings under consideration, involve the "Sale to Private Parties after Deed to State". See Stats. 1939, chap. 154, p. 1274, § 2, which recites: "The provisions of this code in so far as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as restatements and continuations, and not as new enactments".

[1, 2] Defendant does not contend that the sale *to the State* was invalid but claims the invalidity is in the subsequent proceedings. If, therefore, plaintiff would have been barred under section 3897 of the Political Code, subd. (8), as amended, in maintaining such an action, based on the invalidity or irregularity of the proceedings here involved, there is no logical reason to hold that she would not be barred, under the six months provision of that section, from setting up a defense to an action to quiet title based upon the same invalidity or irregularity, particularly where there was no showing that the original owner was in possession of the property. The tax deed which defendant attacks in this proceeding was executed in 1937. The instant action in which she raised its invalidity or the alleged irregularities was not commenced until 1945. Since Miller & Lux, Inc., v. Secara, 193 Cal. 755, 227 P. 171, and Tannhauser v. Adams, supra, 31 Cal.2d 169, 187 P.2d 716, have determined that a lack of jurisdiction due to insufficient notice may be cured by a statute of limitations, and since it is here held that the statute of limitations applies against defendant, it becomes unnecessary to determine the question of the application of the curative statute cited.

The constitutionality of former section 3897 of the Political Code, containing subdivision (8) Stats. 1935, chap. 396, p. 1437, is attacked upon the ground that the limitation contained in that subdivision, which was not contained in former sec. 3897 of the Political Code, was not contained in the title of the act when enacted, citing Art. IV, sec. 24, Constitution of California; 23 Cal.Jur. p. 650, § 46, and cases cited.

[3] The general purpose of the original act was in respect to the sale of tax deeded property and any additional rights or limitation of rights of the parties dealing thereunder conferred by the amendment do not treat of a new subject and, therefore, a reference in the title of the amendatory act to the general subject and to the number of the code section amended was a sufficient compliance with Article IV, Sec. 24 of the Constitution. County of Los Angeles v. Hurlbut, 44 Cal.App.2d 88, 111 P.2d 963; Milgate v. Wraith, 19 Cal.2d 297, 121 P.2d 10.

This sufficiently disposes of the questions raised.

Judgment affirmed.

MUSSELL, J., concurs.

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102 Cal.App.2d 854

CIVIL SERVICE COMMISSION OF SAN DIEGO COUNTY et al. v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY.

Civ. 4251.

District Court of Appeal, Fourth District, California.

March 15, 1951.

The Civil Service Commission of the County of San Diego, Mrs. H. C. Torbert and others, constituting the members thereof, and James Robbins, and others, comprising the Board of Supervisors of the County of San Diego, filed an application for a writ prohibiting the Superior Court of the State of California in and for the County of San Diego, from proceeding with the trial of a certain action. The District Court of Appeal, Barnard, P. J., held that the Superior Court had jurisdiction to try any of the issues raised in an action by employees against the county Civil Service Commission and the Board of Supervisors and therefore prohibition would not lie against Superior Court to restrain it from assuming jurisdiction of action.

Application denied.

Administrative law and procedure 🔑231, 234
Declaratory judgment 🔑208
Mandamus 🔑100
Prohibition 🔑10(2)

Where employees of a county, for themselves and representing all employees in eight classifications, brought an action for declaratory relief and a writ of mandate against the county Civil Service Commission and the county Board of Supervisors based on contention that Board of Supervisors had fixed salaries in particular classifications for a year too low and in violation of the county charter, Superior Court had jurisdiction to try any issues raised, even though petitioning employees did not appear in any of the proceedings by the Civil Service Commission leading up to its order posting salaries, and therefore prohibition would not lie to prevent Superior Court from acting. Labor Code, §§ 1770, 1773.

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James Don Keller, Dist. Atty., Carroll H. Smith and Robert G. Berrey, Deputies Dist. Atty. all of San Diego for petitioners.

Walter Wencke, San Diego, for respondent.

BARNARD, Presiding Justice.

This is an application for a writ prohibiting the respondent court from proceeding with the trial of a certain action, an order to show cause having been issued.

The action in question was brought by eight employees of San Diego County, for themselves and as representing all employees in eight classifications, based on the contention that the board of supervisors had fixed salaries in these classifications for the year 1950–1951 too low and in violation of section 40 of the County Charter, which reads as follows: "Section 40. In fixing compensation the Board of Supervisors shall at least annually, by ordinance, provide in each instance for the payment of not less than the prevailing or general current rate of compensation or wages paid by private employers in the County of San Diego for similar quality or quantity of service, in case such prevailing compensation or wages can be ascertained."

Section 79(a) of this charter requires the Civil Service Commission to classify all positions based on the respective duties and for the purpose of fixing salaries, its report to be submitted to and approved by the board of supervisors in its annual appropriation ordinance, and further provides that this classification must be considered by the board at two meetings held at least thirty days apart.

The action was for declaratory relief and for a writ of mandate. The first cause of action alleged that the plaintiffs were entitled to have their pay fixed in accordance with section 40 of the charter; that the board ignored this section in fixing such compensation, and that the prevailing wages in these classifications were those established by the respective unions to which the plaintiffs belonged. A second cause of action alleged that the rates adopted by the board in 1949 for certain public works, under sections 1770 and 1773 of the Labor Code, were binding on the board in fixing the compensation here in question. A third cause of action alleged that the board, in adopting the salary ordinance, was bound to apply new rates established by the unions after the Civil Service Commission had made its classification report. A fourth cause of action alleged that section 40 applies as a basic rate when an employee begins work for the county, and that any other privileges or benefits later accruing to him may not be considered in determining whether section 40 of the charter has been properly applied. The prayer was for a declaration of rights in accordance with the allegations of the complaint, and for a writ of mandate compelling the board to fix the compensation in these classifications in accordance with the allegations of the complaint, and to make these rates retroactive to the date of the adoption of the salary ordinance.

An answer was filed alleging, among other things, that before filing its classification report for 1950–1951 the Civil Service Commission had held numerous public hearings and had afforded the plaintiffs an opportunity to be heard; that the plaintiffs had failed to appear or to protest; that after the plan was filed with the board the board held two hearings thereon affording the plaintiffs an ample opportunity to be heard; that the plaintiffs failed to appear or to protest; that after said salaries were fixed the plaintiffs had had ample opportunity to appear before the commission and the board which could have given them any relief to which they were entitled, but had failed to do so; and that the plaintiffs have failed to exhaust their administrative remedies.

The commission and the board joined in this application for a writ of prohibition. In support thereof, it is contended that the court has no jurisdiction to try the issues raised because the plaintiffs have not exhausted their administrative remedies; because they have filed no claims with the board; because the remedy sought amounts to an unconstitutional attempt to cause the judicial branch of the government to usurp and exercise the legislative functions vested by law in the board of supervisors; and because a trial of the action would compel the Civil Service Commission, in connection with the defense made by the board of supervisors, to reveal data and material used in making its report which is confidential in nature, and which was obtained on the promise that it would be kept confidential.

On behalf of the respondent it is contended that the court has jurisdiction to interpret the County Charter; that this is the main purpose of the action, the mandate portion thereof being merely incidental; that any classifications of the Civil Service Commission are irrelevant and immaterial "in a proceeding against the Board of Supervisors for the prevailing wage"; that the administrative remedies were exhausted and, in any event, any further effort to get relief from the supervisors would have been futile; that since the suit is against the supervisors and not against the county it was not necessary to present claims to the board; that the issue as to privileged civil service material is not relevant to the last three counts of the complaint; that these petitioners are not the real parties in interest since only the county could act in paying the proper salaries; and that there is a speedy and adequate remedy at law.

We are unable to hold that the court has no jurisdiction to try any of the issues raised. The plaintiffs may be entitled to some interpretation of the charter provisions, and some relief by way of mandate may be proper. While the charter provisions must be complied with, considerable discretion remains with the board of supervisors with respect to similarity of work and various conditions. Goodrich v. City of Fresno, 74 Cal.App.2d 31, 167 P.2d 784. While the board may be compelled to comply with the charter it may not be compelled to act in a particular way, especially in disregard of other elements in the charter provisions. While the complaint seems to go too far, in disregard of the clear intent of the charter provisions calling for the consideration of different elements and for the refixing of compensation at least once a year, and while the allegations and prayer of the complaint leave many things out of consideration, in attempting to set up a fixed standard of compensation and to omit subsequent benefits from consideration, it cannot be said that no issues are raised which are within the jurisdiction of the court. If it should be determined that the board did not take the proper steps in order to comply with section 40, it could be ordered to do so. However, it is not to be assumed that the court would usurp the functions of the board and proceed to fix the compensation in question, or that it would do so on the sort of prima facie showing here contended for by the plaintiffs. It is not to be assumed that the court will go beyond the issues properly raised and, so far as disclosed by the record before us, it would seem unlikely that the petitioners will find it necessary to disclose any confidential information.

The order to show cause is discharged and the application for writ of prohibition is denied.

GRIFFIN and MUSSELL, JJ., concur.

102 Cal.App.2d 559

BROWN et al. v. JACK & JEFF TRANSFER CO. et al.

No. 14524.

District Court of Appeal, First District, Division 1, California.

March 1, 1951.

Separate actions by Fred Brown and Ray Brown against the Jack & Jeff Transfer Company, and others, to recover damages for personal injuries received in a collision between an automobile and defendants' truck. Defendants filed a cross-complaint for damages to truck. The cases were consolidated for trial. The Superior Court, in and for the County of Santa Clara, Leonard R. Avila, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Bray, J., held that the evidence established that defendants were free from negligence, and that the sole cause of accident was the negligence of first named plaintiff.

Affirmed.

1. Appeal and error 🔑931(1)

Upon appeal of personal injury action judgment for defendants, District Court of Appeal would accept the evidence and the reasonable inferences therefrom most favorable to defendants.

2. Automobiles 🔑244(10, 35, 42)

Evidence sustained finding that plaintiff motorist was negligent in negotiating a curve on a highway in that he did not follow the main highway, but curved off far to the right and had to come back on highway at almost a right angle, where he collided with the rear of a truck-trailer as it was coming in opposite direction, and that truck driver was not negligent in failing to see lights of automobile or in driving at an excessive speed.

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E. C. Mahoney, Burlingame, for appellants.

Carroll, Davis & Friedenrich, San Francisco, for defendants.

BRAY, Justice.

In consolidated actions, tried without a jury, for damages for personal injuries received in a collision between an automobile and a truck, judgment went for defendants. Plaintiffs appealed.

Questions Presented.

Plaintiffs claim that the evidence is insufficient to support the judgment because the physical facts belie the oral testimony. Both actions were brought against the driver and the owners of the truck,—a tractor and semi-trailer type. One was by plaintiff Fred Brown, the driver of the automobile, a Terraplane with two-wheel trailer attached. The other was by his brother, Ray, who was a passenger in the car. In the Fred Brown action, defendants cross-complained for damages to the truck. The cases were consolidated for trial. In each case the court found that defendants were free from negligence and that the sole cause of the accident was the negligence of plaintiff Fred. It rendered a single judgment covering both cases, in favor of defendants on the complaint, and on the cross-complaint gave defendants the sum of $1,000 for damage to the truck. Facts.

[1] Having in mind the rule that we must accept the evidence, and the reasonable inferences therefrom, most favorable to defendants, the facts appear as herein set forth.

The accident occurred about 9:00 p.m., November 28, 1947, on the Pacheco Pass Road about 2.5 miles east of Gilroy. The night was dark and moonless, and a light mist was falling, coating the windshield and dampening the road surface. The road makes a 103 degree change in direction from generally southeast to northeast. Instead of making the turn, it is possible, when approaching the curve from either direction, to continue straight ahead onto lesser black-top extensions. These extensions, one of which is Frazier Lake Road and the other an anonymous cutoff, intersect at a point some 100 feet south of the curve, and with it, in effect, form an inverted triangle—the apex (intersection) being at the bottom and the base (the curve of the Pacheco Pass Road, where the accident occurred) at the top. Within the triangle is a clear, level, graveled area which cars may cross. These extensions are unmarked, paved country lanes.

Fred and Ray and a man named Fulk had dinner at Redwood City. There was some confusion in the evidence as to the drinking by the party, although Fred testified he had only two beers. As they approached the scene of the accident from the west, Fred was driving, Ray sitting alongside him. Fulk sat on the rear floor, the back seat having been removed to facilitate the carriage of furniture on the return trip. Fulk was drinking whisky from a bottle and there was an open case of beer alongside him. The windshield wiper was not going at the time of the accident, although Fred had turned it on and off from time to time.

Plaintiffs testified that their headlights through the precipitation picked out the broken white line which divided the two opposing lanes. From some 200 feet to the front there was a sweep of lights as defendants' truck swung into the curve from the opposite direction. When it was within fifty to sixty feet, plaintiffs could see that the truck's left rear wheels were three to twelve inches across the white line, and sliding. Fred pulled the Terraplane to his right and set the brakes just as the truck's big duals caught the left front of the car. The truck axle broke and the duals spun off the road. The back of the moving van dropped to the roadway and the truck dragged 300 feet around the curve before parking. The Terraplane came to rest on the south shoulder of the road facing northeast, in the original direction of travel.

Defendant Newton's testimony varied materially from that of plaintiffs. He was driving the truck westerly and saw no lights as he approached or came around the curve. His 1947 International, consisting of a tractor and semi-trailer, was approximately thirty-five feet in length. He was rounding the curve on his own side of the road at an estimated speed of between thirty and thirty-five miles per hour when, as he told the investigating officer immediately after the accident, "something hit" him "from the rear." The rear of the trailer immediately dropped down. He pulled on ahead so as to clear the curve before parking. Examination of the truck revealed that the collision had broken the trailer axles, knocked off the left rear duals, and bent the side immediately above the wheels. There were no scraping or sideswiping marks or damage in front of the rear duals. Newton walked back around the curve and found plaintiffs' wrecked car on the south shoulder of the highway, facing northeast. Newton saw tire marks coming onto the highway from the graveled area and leading to a gouge mark on his side of the highway which was the point where he claimed that his semi-trailer fell. These tire marks ran completely across the graveled area and were twenty-five or thirty feet in length. Later, Murie, the highway patrolman called by plaintiffs, testified he saw these same tire marks coming in at a forty-five degree angle from the graveled area. He said they were about forty-five feet in length but due to other marks of travel (there were other vehicles parked at the scene of the accident when he arrived) he could not tie them up with a continuous line into the scene of the accident. Murie testified that the gouge mark in the paving was four inches north of the white line (the truck's side) and about eleven feet ahead of where the car rested. He found another gouge mark, also on the truck's side of the highway, about four feet ahead of plaintiffs' car.

The report of Highway Patrolman Murie of the accident was read without objection. This listed the accident not as a sideswipe, as contended by plaintiffs, but "from the nature of damage to" plaintiffs' car "almost front or right angle impact with left rear dual of trailer together with tire marks onto roadway from southwest shoulder. It is our opinion that this vehicle may have come into the curve too fast and in trying to come back onto roadway, hit the rear of the trailer at almost right angles." (The report also stated that Fred "had been drinking, not known if ability impaired.") It also gave the cause of the accident as "improper passing" by plaintiffs' car.

An examination of the photographs and map in evidence indicates that, under the circumstances of the case, this theory is reasonably probable. Driving around the curve in question from the west, as did plaintiffs, the driver would come on a wide area of paved roadway. Unless he followed the white line closely or if he was driving fast, his tendency would be to go straight ahead into Frazier Lake Road or into the triangular graveled area instead of curving to the left with the Pacheco Pass highway. This would account for Newton's failure to see plaintiffs' headlights as they would be shining down Frazier Lake Road and away from Newton as he came around the curve from the east. A driver having entered the Frazier Lake Road, or the triangular graveled area, and discovering his error, would have to swing left onto the graveled shoulder between the road and the south side of the highway and thence onto the macadam of the highway. The evidence indicates that that is what plaintiffs did, but that in getting back onto the highway they ran across the white line, striking defendants' truck on the left rear of the semi-trailer. Likewise, if plaintiffs did not make their turn to the left until their car was about opposite the semi-trailer, their headlights might not be visible to the driver ahead in the tractor, whose eyes should be on the curve around which he was going. The semi-trailer was struck approximately four feet from the back of the trailer and about twenty-five feet back of the driver's compartment. We thus have a case in which the plaintiffs testified that they were traveling on their right side of the road, and the rear of the defendants' truck came across the white line and sideswiped their car,—and in which defendant Newton testified that he was driving on his right side of the road and plaintiffs' car came across the white line and struck his semi-trailer. The trial court believed Newton. Moreover, the highway patrolman's testimony supported Newton. As there was a conflict in the evidence, we must accept the court's determination, unless plaintiffs can demonstrate that defendants' evidence is inherently improbable. This brings us to plaintiffs' contention that the physical facts demonstrate this improbability.

Physical Facts.

[2] 1. Plaintiffs contend that Newton's failure to see the lights of plaintiffs' car demonstrates that he was not driving in a prudent manner. As herein shown, this failure was explainable under the circumstances of the case. Moreover, an inference could reasonably be drawn that plaintiffs' lights were not on or were, at least, defective. Both plaintiffs testified that they had had considerable difficulty with their headlights, stopping several times between Redwood City and San Jose to fix them. It is true that they testified that they had no trouble with them after leaving San Jose. However, they stopped in San Jose for a flashlight. They explained they wanted it for another purpose. Fred made a statement of some significance on this question. He was asked if as he came along the straightway just before entering the curve his lights did not show down Frazier Lake Road. He replied, "They should, but you couldn't see anything at night." He was then asked, "Q. You mean to say your lights were, such as your car is, on the straightway the lights don't show straight ahead of you? A. For a second or so."

2. Defendants' truck traveled 315 feet on a level road, with the rear wheel dragging, after it was struck. Defendant Newton testified, however, that he purposely drove it that far in order to get it off the curve so that it would not be a menace to traffic. The trial court obviously believed this explanation, and not plaintiffs' argument that it was going so fast it could not be stopped within that distance.

3. Plaintiffs' car was located on the south shoulder of the highway, headed in its original direction and in such condition, say plaintiffs, that it could not have moved under its own power more than a foot or two after the impact. Its left front was badly smashed. Plaintiffs contend that the fact that the car was on the shoulder after the accident conclusively shows it must have been there when hit. Against this contention is the testimony of Newton as to where the accident occurred and the gouge marks and tire marks. One was approximately four feet and the other eleven feet ahead of where plaintiffs' car rested, and both were on the north (or defendants') side of the highway. From the former, a mark extended all the way to defendants' truck. A reasonable inference is that the first mark was made by the truck's broken axle, and the second by the trailer dropping to the pavement. Plaintiffs claim that if these marks indicate these things it would be physically impossible for their car to end up four and eleven feet, respectively, behind these marks. It is impossible to tell what would happen when these vehicles came together, and it is neither impossible nor improbable for plaintiffs' car to have struck the semi-trailer on the north side of the center line and to be hurled back of the point of impact. It must be remembered that the force of the collision was sufficient to knock off the duals and break the trailer axle, and bend the side immediately above the wheels. Likewise, the damage to plaintiffs' car was considerable, "the whole front end pushed the motor back and the left front wheel was torn off entirely." Fred also testified that the damage was to the left front part of his car. The damage was not such as would come from a sideswipe but was such as would occur if the left front of plaintiffs' car struck the trailer on an angle. Plaintiffs testified that they were approaching the truck parallel, and that when they saw the dual wheels skidding towards them the driver turned the car to the right. It is impossible to reconcile this statement with the condition of the car after the accident. Plaintiffs' contention that their car could not have been knocked to the shoulder by the truck is a bit difficult to reconcile with their own version of the accident. Fred testified that the duals, when they struck his car, were from three inches to a foot on his

side of the white line, and although he was knocked unconscious for a second he thinks his car did not move after being struck. Obviously, when it came to rest it was not on the highway within three inches to a foot from the white line. Whatever would have forced it to the shoulder from the position where he claims it was, could have forced it likewise to the shoulder from a point four inches the other side of the white line. Moreover there were tire marks across the graveled area which support the patrolman's and the trial court's theory that plaintiffs came from that direction. Some portions of these marks were obliterated by later travel but there were sufficient left to support the court's conclusion that that was where plaintiffs' car came from. Plaintiffs' main contention is predicated entirely upon the physical impossibility of the Terraplane being where it was found by the witnesses if the accident had occurred as asserted by defendants. No such impossibility appears. The reports are replete with automobile accident cases in which one of the parties seeks to establish from the condition and position of the cars after the accident, considered in the light of common experience, mathematics, or the laws of physics, that the accident could not possibly have occurred as the trier of the fact has concluded. "* * * such arguments are unreliable because they fail to take into account the human element, what may have been done by the respective drivers, and because of the many uncertainties which necessarily exist in such matters as the respective weights of the cars, the respective speeds, the exact positions, the force and direction of the blows, and many other elements." Nagamatsu v. Roher, 10 Cal.App. 2d 752, 755, 53 P.2d 174, 175, and cases cited; see also Siegell v. York, 84 Cal.App. 2d 383, 387, 191 P.2d 50. As stated in Hawthorne v. Gunn, 123 Cal.App. 452, at page 455, 11 P.2d 411, 412: "Perhaps there is nothing more certain about an automobile accident than the fact that the visible results afterward are not an infallible guide in determining what occurred."

4. Much of plaintiffs' contention is based upon the assumption that the facts were as testified by the occupants of plaintiffs' car. The trial judge obviously did not believe them. In his opinion he said: "Plaintiffs and their passenger in their testimony were somewhat vague and conflicting as to matters in which they might be expected to be more positive which may be accounted for by the fact of their admitted drinking of beer and whiskey both before and during their 2½ [hour] drive to the place where the collision occurred." Plaintiffs contend that their testimony was neither vague nor conflicting. A reading of the record supports the judge's conclusion in this respect. Moreover, the highway patrolman, who was called as plaintiffs' witness, corroborated defendant Newton.

This is another case in which the trier of the facts, having seen the witnesses testify, is in a much better position to determine their credibility than we, and where the physical facts support defendants' version of the accident at least as much if not more than plaintiffs' version.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

102 Cal.App.2d 730

HILLIARD v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 14562.

District Court of Appeal, First District, Division 2, California.

March 8, 1951.

Hearing Denied May 3, 1951.

Action by Jack Hilliard against the Bank of America National Trust and Savings Association, a national banking corporation, to recover the amount plaintiff paid to defendant upon an automobile mortgage. The Superior Court in and for the County of Alameda, A. P .Shine, J., rendered a judgment in favor of defendant and plaintiff appealed. The District Court of Appeal, Goodell, J., held that the evidence established that plaintiff had no right to recover from bank on ground of unjust enrichment, mutual mistake of fact, or failure of consideration.

Judgment affirmed.

1. Chattel mortgages 🔑129

While the Vehicle Code calls a mortgagee of a motor vehicle the legal owner, such legislative fiat does not alter the settled rule that mortgagee has no title. Vehicle Code, § 67.

2. Pleading 🔑36(2)

In action by a used car dealer against a bank to recover the amount that plaintiff paid to bank in satisfaction of a chattel mortgage upon an automobile, where plaintiff's complaint admitted that bank had a status as purported chattel mortgagee, and ownership of an automobile in question was never an issue, plaintiff could not contend that bank was anything but a mortgagee. Vehicle Code, §§ 67, 402(f); Civ. Code, § 2888.

3. Bills and notes 🔑434

Where purported owner of automobile borrowed approximately $1,000 from a bank and gave a promissory note therefor, and used car dealer paid off the note to the bank in order to consummate the purchase of automobile, and it later turned out that automobile in question was stolen property, and used car dealer was required to pay off owner of automobile so as to make its purchaser's title good, used car dealer had no right to recover from bank on ground of unjust enrichment, mutual mistake of fact, or failure of consideration.

4. Estoppel 🔑72

Where purported owner of automobile borrowed approximately $1,000 from bank and gave a promissory note therefor, and used car dealer paid off note to bank in order to consummate purchase of automobile, and it later turned out that automobile was stolen property and used car dealer had to pay off rightful owner in order to make its purchaser's title good, in absence of any negligence on the part of the bank which caused used car dealer's loss, used car dealer could not contend that bank suffered the loss as a negligent party of two innocent persons. Civ.Code, § 3543.

5. Bills and notes 🔑326

Where purported owner of automobile borrowed about $1,000 from the bank and used car dealer in order to consummate purchase of automobile paid off note to bank, there was no breach of implied warranty of ownership of automobile by bank, since the bank did not sell its note or mortgage, but used car dealer merely extinguished both the debt and the lien. Civ. Code, § 1756.

Brown, Smith & Ferguson, Oakland, for appellant.

Samuel B. Stewart, Jr., Christopher M. Jenks, San Francisco, H. H. Bechtel, Oakland, Charles E. Cooper, San Francisco, for respondent.

GOODELL, Justice.

Appellant is a used car dealer, and on April 21, 1947 one Cassaro drove a 1941 Buick into his lot in Oakland and offered it for sale at $1,250. The car had no license plates, but a sticker on its windshield indicated that they had been applied for in Oklahoma. Cassaro informed appellant's manager, Paul Murray, that respondent bank held a chattel mortgage on the car.

When Murray telephoned to verify this, the bank's representative stated that it was the legal owner of the car and that its claim amounted to $1,008.37. Murray, acting for appellant, agreed to pay Cassaro $1,250 for the car, mailed the bank a check for $1,008.37, paid Cassaro the difference, and took delivery of the car, all on the same day. About a month later the bank sent appellant the pink slip purporting to be the certificate of ownership, as soon as it came from the motor vehicle department.

After reconditioning the car, and about four months after the sale, appellant sold it to one Warren. It later turned out that everybody concerned had been dealing with a stolen car which belonged to General Petroleum Corporation.

When Warren made claim on appellant, the latter promptly paid General Petroleum Corporation $1,400, the value it placed on the car, thus making good Warren's title. Appellant then brought this action against the bank for the $1,008.37. The court rendered judgment in favor of the bank for costs, and this appeal was taken.

Appellant's position is that the bank dealt with the car as the *owner* thereof because of the language of sec. 67, Vehicle Code, which defines "legal owner", inter alia, as "the mortgagee of a vehicle". While conceding the general rule that "a lien * * * transfers no title," sec. 2888, Civ.Code, appellant argues that the peculiar provisions of sec. 67 are specific and therefore controlling over sec. 2888 whenever motor vehicles are concerned. From this premise he argues that there was a failure of consideration since he, a bona fide purchaser of the car, paid the bank the amount it demanded "for sale of the legal title", and is now entitled to restitution because it turned out that the bank had no title, the car having been a stolen vehicle.

[1] It is perfectly clear that while sec. 67 calls a mortgagee a "legal owner", such legislative fiat does not alter the settled rule that a mortgagee has no title. In re Senetos, D.C., 29 F.2d 854. The words "legal owner" were employed in sec. 67 only in a "special sense", Jolly v. Thornton, 40 Cal.App.2d Supp. 819, 821–822, 102 P.2d 467, so special, indeed, that the definition does not even apply or extend to all parts of the self-same code, for sec. 402 thereof, which deals with liability of owners for negligence, provides in subd. (f) that "A chattel mortgagee of a motor vehicle out of possession shall not be deemed an owner within the provisions of this section". See Graf v. Harvey, 79 Cal.App. 2d 64, 70, 179 P.2d 348. Hence the premise on which appellant's argument is built is not a valid one.

[2] Secondly, appellant's contention that he bought the car from the bank and paid it $1,008.37 "for sale of the legal title", is contradicted by his verified complaint, wherein he alleges that Cassaro, the purported owner, agreed to sell the car to plaintiff; that defendant held a purported chattel mortgage on which there was an unpaid balance of $1,008.37, and that plaintiff, "in order to consummate such sale and to acquire clear title to said automobile, did pay off, by check, said purported chattel mortgage to the defendant" in the amount of $1,008.37 "and the said defendant did release said purported chattel mortgage; * * *". Since the bank's status as a (purported) chattel mortgagee was thus admitted by plaintiff's own complaint, and ownership was never in issue, appellant cannot now contend that the bank was anything but a mortgagee.

[3] Thirdly, it cannot be claimed that Murray, with almost 20 years' experience in buying and selling automobiles, did not know that the bank was merely a mortgagee. He testified on cross-examination that he understood the bank held a chattel mortgage and that Cassaro "wanted us to pay off the loan * * * and the balance due to him." Also: "Q. Well you know sufficient of the motor vehicle registrations expressions? A. Yes, I do. Q. And a legal owner doesn't actually mean as it does in other transactions? A. That is right. It is a little different terminology than saying a chair, for instance." By this simple illustration he showed that he knew that the legal owner of a chair held title to the chair, not merely a mortgage on it. He knew, moreover, that the bank did not have possession, because Cassaro drove the car into appellant's place of business, and by offering to sell it for $1,250 and accepting that price, exercised an owner's dominion over it.

It is an undisputed fact that Cassaro borrowed approximately $1,000 from the bank and gave a promissory note therefor. It may be conceded that, had the bank attempted to foreclose its chattel mortgage it would have found its "security" valueless. But it was still entitled to a personal judgment on the obligation evidenced by the note. Frost v. Witter, 132 Cal. 421, 428, 64 P. 705; Gaffner v. American Finance Co., 120 Wash. 76, 206 P. 916, 28 A.L.R. 624. "The debt, note or other obligation is the principal thing, the duty to pay or perform which is none the less binding because it is secured by mortgage". 17 Cal.Jur. pp. 710–11. The lien is accessory to the principal debt, sec. 2909, Civ.Code.

By appellant's own admissions he paid off the note to the bank in order to consummate the sale of the car. He made the payment voluntarily, on Cassaro's written authorization, hence for his account, and just as if he had paid Cassaro the whole $1,250 and the latter had then paid off the bank out of that sum. See Gaffner case, supra, 206 P. at page 918.

The bank, when it lent Cassaro $1,000 believed him to be the owner of the car; appellant when he paid $1,250 for the car believed Cassaro to be its owner; both were mistaken, but such type of mistake in the present circumstances is no basis for an action by one innocent party against another for restitution.

The facts in the Gaffner case, supra, were identical with the facts herein. The only differences between them (which are but incidental and immaterial) are that there (a) the mortgagee was a finance company instead of a bank; (b) the mortgagor of the stolen car was himself the thief (which is by no means a certainty herein) and (c) the mortgage was paid off at the finance company while here the check for $1,008.37 was mailed, accompanied by a letter and a printed pay-off slip signed by Cassaro authorizing the bank to accept from appellant the $1,008.37 "being the balance due on my account". There the judgment was for defendant finance company and the appellant urged, as this appellant urges, that where one pays money to another through mistake he is entitled to recover it back from the payee. The court held: "The general rule is that an action for money had and received can be maintained whenever one has received money from another by mistake, and which the receiver ought not, in equity and good conscience, to retain. We are of the opinion, however, that the facts of this case do not come within that rule. The respondent had made a bona fide loan to Hughes, not upon a forged note, but upon that given by the borrower himself. Hughes actually became indebted to the respondent. It is true the mortgage given to secure the indebtedness was upon a stolen machine, and was consequently fraudulently made and probably invalid, but the mortgage was a mere incident of the loan. Though the mortgage was invalid and worthless, the debt it secured was actual and enforceable. The appellant tried to purchase Hughes' automobile, but wished it to be clear of the apparent incumbrance. The money which was paid to the respondent was to discharge a bona fide indebtedness; consequently, it cannot be said that there was no consideration for the payment, or that the respondent cannot, in good conscience, keep the money. The situation is different than in those cases where both the note and mortgage were tainted with fraud. Here there was no mistake as to the indebtedness which was paid."

Appellant relies on Ritter v. Manhattan A. F. Corp., 5 N.Y.S.2d 773 as being on all fours. That case was before the Supreme Court, Appellate Term, on appeal from the Municipal Court. The per curiam opinion which does not pretend to give the facts in any detail, and cites no authority, reads: "Both parties to the transaction honestly believed that Smith, the chattel mortgagor, was the owner of the car stolen by him. Appellant, under a mutual mistake of fact, paid the balance due on the chattel mortgage to the respondent, the assignee of the chattel mortgagee. The car having been delivered to the true owner, there was a failure of consideration entitling the appellant to recover back what was paid, from the respondent, upon whom the loss should properly fall."

If we assume that the facts were parallel, there remains the Gaffner case where the facts and the law are discussed in detail and a conclusion reached contrary to that of the New York case. The reasoning of the Gaffner case commends itself to us and we are prepared to follow it rather than the Ritter case.

[4] The Gaffner case disposes of appellant's second, third and fourth points, namely, unjust enrichment, mutual mistake of fact, and failure of consideration. His two remaining points are, first, that "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Sec. 3543, Civ.Code. Appellant can-

not point to any negligence of the bank which caused appellant's loss. It is argued that appellant relied on the fact that the bank had lent money on the car. The bank believed the car to be Cassaro's but no legal liability can be predicated on this mistake. It did nothing to induce appellant to buy the car or pay off the note; it simply told appellant that $1,008.37 would settle its claim, and that it had taken a chattel mortgage, all of which was true.

[5] Appellant's fifth contention, that there was a breach of implied warranty, is based on a false premise. Counsel cite sec. 1756, Civ.Code, which deals with "Warranties on sale of document". The bank did not *sell* its note or mortgage. Appellant alleged that he, "to acquire clear title to said automobile, did pay off, by check, said purported chattel mortgage * * * and the said defendant did release said purported chattel mortgage". Nothing was "sold" but the Buick, and that was sold by Cassaro (not the bank), according to appellant's own pleading. The bank made no warranties to appellant. Appellant simply inquired, and found out that Cassaro owed the bank $1,008.37, and without further ado paid it off. There was no assignment of either the note or the mortgage, but an extinguishment of both the debt and the lien.

Appellant relies on National Shawmut Bank of Boston v. Fidelity Mutual Life Ins. Co., 1945, 318 Mass. 142, 61 N.E.2d 18, 159 A.L.R. 478, but the opinion therein itself, at 61 N.E.2d 21, 159 A.L.R. 483–484, differentiates that case from Gaffner v. American Finance Co., supra. In the Gaffner case the court said: "The situation is different than in those cases where both the note and mortgage were tainted with fraud. *Here there was no mistake as to the indebtedness which was paid.*" (Emphasis added.) In the Shawmut Bank case Schneierson, whose name had been forged as the maker of the notes and the assignor of the insurance policies, by Meissel, was never indebted to the defendant insurance company, which had received from the Shawmut Bank the money to pay off the supposed indebtedness. Here Cassaro had become the respondent bank's debtor in a routine banking transaction and had given it a genuine promissory note. The court in the Shawmut Bank case, after citing the Gaffner case (among others) says: "The case at bar differs from the cases just discussed primarily in the fact that in this case the defendant had no valid claim against its supposed debtor, Schneierson, or against anyone, except its claim against Meissel for the forgery." [318 Mass. 142, 61 N.E.2d 21.] When the court thus distinguishes the Gaffner case it likewise distinguishes the instant case, since the facts in both are substantially the same.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; SCHAUER, J., dissenting.

102 Cal.App.2d 778

WILSON et al. v. BARRY et al.

Civ. 7862.

District Court of Appeal, Third District, California.

March 12, 1951.

H. Pierce Wilson and others brought action against Robert R. Barry, Wilford Carey, as administrator of the estate of W. Gibson Carey, Jr., Fred Dunning, Coleman Burke, the California Trust Company, a corporation, and others. The Superior Court of Plumas County, J. O. Moncur, J., rendered an order granting the motion of the named defendants to withdraw appearance made in their behalf, and the plaintiffs appealed. The District Court of Appeal, Peek, J., held that evidence authorized conclusion by Superior Court that attorney lacked authority to appear on behalf of all named defendants, except Robert R. Barry, and that the appearance, being unauthorized, was not binding on the named defendants, except Robert R. Barry, and that filing of affidavit by Robert R. Barry in support of motion for summary judgment constituted a general appearance.

Order reversed as to Robert R. Barry, and affirmed as to the other named defendants.

1. Attorney and client ⚷70

An attorney presumably has authority to appear for any person for whom he professes to act, but such presumption is disputable.

2. Attorney and client ⚷72

Evidence was sufficient for trial court to conclude that attorney lacked authority to appear on behalf of certain defendants, who had never been served, and that his appearance was not binding on them, and, therefore, motion to withdraw appearance for them was properly granted.

3. Appearance ⚷9(5)

The filing of a motion predicated on court having personal jurisdiction, constitutes a "general appearance".

See publication Words and Phrases, for other judicial constructions and definitions of "General Appearance".

4. Appearance ⚷9(1)

The filing of an affidavit, other than for purpose of presenting matters bearing on court's jurisdiction, constitutes a "general appearance".

5. Appearance ⚷9(5)

Where defendant, who had not served, executed affidavit in support of motion for summary judgment, his action constituted a "general appearance" and trial court should not have permitted withdrawal of that appearance.

* * *

Robert W. Steel and Erling S. Norby, Marysville, for appellants.

McAllister & Johnson and Walter C. Frame, Sacramento, for respondents.

PEEK, Justice.

This is an appeal from an order granting respondents' motion to withdraw appearances made in their behalf in an action instituted by appellants.

The complaint, which was filed on August 20, 1948, named as defendants, Robert R. Barry, Wilford Carey, as administrator of the Estate of W. Gibson Carey, Jr., Fred Dunning, Coleman Burke, Plumas Land Company, a corporation, Plumas Mining Company, a corporation, Plumas Lumber Company, a corporation, California Trust Company, a corporation, as Trustee, and numerous John Does. No summons was issued and apparently no attempt was made to serve any of the above named defendants. On April 30, 1949, attorney Frank H. McAuliffe filed a demurrer to the complaint and a motion for summary judgment purportedly on behalf of all of the defendants. The motion for summary judgment was supported solely by the affidavit of Robert R. Barry, who was designated as "one of the defendants above named, and the President of defendant corporations Plumas Land Company, Plumas Mining Company, and a stockholder of Plumas Lumber Company." Approximately four months later McAuliffe filed a demurrer to the amended complaint, likewise on behalf of all of the defendants. On October 5, 1949, McAuliffe noticed a motion to withdraw the appearances of Robert R. Barry, Wilford Carey, as administrator of the Estate of W. Gibson Carey, Jr., Fred Dunning, Coleman Burke, and California Trust Company. Two affidavits accompanied the motion. (1) That of Eleanor Carey stated that she is one of the executors of the Estate of W. G. Carey, Jr., having been appointed by the Probate Court in the state of Connecticut; that neither of the regularly appointed executors of said estate has ever applied for ancillary proceedings in California; that Wilford Carey "is a person entirely unknown" to her; that no authorization has ever been given McAuliffe to appear on behalf of the said estate or its representatives. (2) That of Frank H. McAuliffe stated that he "assumed" from a conversation with Barry that it was the desire of all of the defendants to appear in the action; that he prepared papers for filing without discussing the legal result thereof with Barry, the only defendant with whom he had any discussion prior to making an appearance; that he subsequently learned it was the intention of Barry that affiant appear only on behalf of the Plumas Land Company, the Plumas Mining Company, and the Plumas Lumber Company, and that Barry was not authorized to effect the appearance of other defendants and he did not intend to authorize affiant to appear for such other defendants.

While the appeal is from the entire order permitting respondents to withdraw the appearances made on their behalf, appellants concede that the executors of the Estate of William Gibson Carey, Jr., had no authority in law beyond the jurisdiction of the state of Connecticut and that the order should be affirmed as to the withdrawal of the appearances made on behalf of that estate.

Appellants' argument is, essentially, that the affidavit of attorney McAuliffe, which was the only evidence in support of the motion before the trial court as to the remaining defendants, fails to demonstrate any lack of authority for the appearances made on behalf of such defendants.

[1] There is a presumption that an attorney has authority to appear for any person for whom he professes to act, Voinich v. Rolleri, 203 Cal. 379, 264 P. 240, but this presumption is disputable, Sullivan v. Dunne, 198 Cal. 183, 244 P. 343.

[2] The record shows sufficient evidence for the trial court to conclude as it did, that McAuliffe lacked authority to appear on behalf of respondents, and being unauthorized, was not binding on them, hence the motion to withdraw the appearances of respondents was properly granted except as to the defendant Barry. Forbes v. Hyde, 31 Cal. 342; Merced County v. Hicks, 67 Cal. 108, 7 P. 179; People v. Western Meat Co., 13 Cal.App. 539, 110 P. 338.

[3-5] McAuliffe's lack of authority to appear on behalf of the other respondents is not decisive of the question of whether or not his appearance on behalf of Barry could be withdrawn. Barry, personally, as one of the defendants named in the complaint, executed the affidavit in support of the motion for summary judgment. The filing of a motion which is predicated upon the court having personal jurisdiction constitutes a general appearance. Judson v. Superior Court, 21 Cal.2d 11, 129 P.2d 361. Likewise the filing of an affidavit, other than for the purpose of presenting matters bearing on the court's jurisdiction, constitutes a general appearance. See 6 C.J.S. Appearances, § 12, page 23. Therefore, Barry's action constituted a general appearance, and the trial court should not have permitted the withdrawal of that appearance.

The order appealed from is reversed as to respondent Barry, and affirmed as to the other respondents.

ADAMS, P. J., and VAN DYKE, J., concur.

102 Cal.App.2d 608

HARMAN et al. v. WALSH et al.

Civ. No. 17703.

District Court of Appeal, Second District, Division 1, California.

March 5, 1951.

Action by Albert Ervan Harman and another against James J. Walsh and another, for specific performance of a contract for sale of realty, furniture and furnishings to plaintiffs. The defendants filed a cross-complaint to quiet title. The Superior Court of Los Angeles County, Kenneth C. Newell, J., rendered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Doran, J., held that where contract obligated plaintiff to pay $100.00 or more per month on fifth day of September, 1945 and on first day of each succeeding month thereafter and nowhere in instrument was there any suggestion in event plaintiffs should pay more than $100.00 in one month later monthly payment should be reduced by excess, plaintiffs only privilege was to pay more than stipulated sum on first of any month and no privilege to pay less than $100.00 in any one month was granted.

Judgment affirmed.

1. Vendor and purchaser ⇨77

Where realty contract obligated plaintiff purchasers to pay $100 or more per month on first day of September, 1945 and first day of each succeeding month thereafter and nowhere in instrument was there any suggestion that in event plaintiffs should pay more than $100 in one month, later monthly payments should be reduced by excess, plaintiffs only privilege was to pay more than stipulated sums on first of any month and no privilege to pay less than $100 for any one month was granted.

2. Vendor and purchaser ⚷46

Equity is concerned with rights of both purchaser and vendor.

3. Specific performance ⚷121(11)

In purchasers' action for specific performance of realty contract, wherein vendors filed a cross-complaint to quiet title, evidence sustained finding that purchasers were in default in making payments, that such default had not been waived and notice of forfeiture had been given, that under contract defendant vendors were entitled to retain as liquidated damages all sums paid by purchasers, and that purchasers had no right, title or interest in property.

Martin P. Deming and Henry W. Cutter, Pasadena, for appellants.

W. Roger Revelle, Pasadena, and Wellborn, Barrett & Rodi, Karl B. Rodi, all of Los Angeles, (Owen F. Goodman, Los Angeles, of counsel), for respondents.

DORAN, Justice.

The action herein was instituted by the plaintiffs as purchasers under a contract for the sale of real estate, furniture and furnishings. Claiming an unlawful forfeiture by defendant sellers, the complaint seeks specific performance and damages. The defendants filed a cross complaint to quiet title. Judgment was rendered in favor of defendants upon findings that the plaintiffs were in default in making payments, that such default had not been waived, that notice of forfeiture had been given. The trial court concluded that under the contract terms the defendants were entitled to retain as liquidated damages all sums paid by plaintiffs, and that plaintiffs had no right, title or interest in the property.

A written "Agreement for Sale of Real Estate" was executed by the parties on August 5, 1945, under which respondents agreed to sell the property to appellants for a price of $7,505. Appellants made a down payment of $100, and agreed to make monthly payments of "$100 or more dollars, per month on the 1st day of September, 1945, and the first day of each succeeding month thereafter, until such time as the principle has been reduced the amount of * * * $1,605". When such reduction in the amount due had been achieved, it was agreed that the property should be placed in escrow for the execution of a deed to plaintiffs and a trust deed back to defendants, the payments thereafter to be $50 or more per month. The sale had been effected through a broker whose commission of $395 appellants had agreed to pay. Upon execution of the agreement, appellants went into immediate possession of the property.

The agreement provides: "It is understood and agreed, that time is of the essence of this contract and should the buyer fail to comply with the terms hereof, then the Seller may at his option be released from all obligations in law and in equity to convey said property, and the buyer shall thereupon forfeit all right thereto and to all moneys theretofore paid under this contract as liquidated damages".

The record discloses evidence that no payment was made in February, 1946 and upon request for this payment the Harmans claimed that no payment was due in February for the reason that in prior months excess payments of more than $100 had been made. This interpretation was protested by the sellers, and in March, 1946 payment of $200 was made by the buyers. In April, May, June, July and August, 1946, the specified payments of $100 were duly made on the first days of those months. On September 1, 1946 two checks were presented by appellants, one of appellant Violet Harman for $49.27 which was dishonored at the bank, and another check of Harry R. Kelly, for $50.73 which was duly paid. Mr. Kelly was a brother of Mrs. Harman who occupied the property and paid rent to the

Harmans of $50 per month. No further sum was ever paid to respondents in satisfaction of the September payment.

On September 15, 1946 respondents' attorney notified appellants in writing of the September default and that the latters' rights would be forfeited unless the default was cured by October 1, 1946. On October 1, 1946, on account of the October installment, Mr. Kelly, by check, made a $50 payment. No further payments were made by any person, and on October 14, 1946 respondents gave written notice of forfeiture to the appellants.

It is appellants' contention that the written contract of sale is ambiguous as to the amount of payments due each month; that "The construction * * * adopted by the parties and as understood by the plaintiffs was that if total payments of the contract equalled One Hundred ($100.00) Dollars per month, the plaintiffs had fully complied with the payment terms of the contract". Since the contract is ambiguous, say appellants, it should be construed in favor of appellants.

It is further insisted by appellants that by the acceptance of the $50 payment on October 1, 1946, defendants waived the right of forfeiture, and that a new notice of forfeiture was then necessary. Appellants also claim to be entitled to relief under Section 3275 of the Civil Code providing that "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture * * * by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty". Appellants denominate the default as "merely technical", and aver that considering all payments made since inception of the contract, the total amounts to $22 more than the required monthly payments. It is therefore declared that "the equities are all strongly in favor of the Plaintiffs".

It is likewise contended that "Defendants, by their conduct, repudiated the contract, thus excusing further tender or offer of performance by the plaintiffs", and that "Plaintiffs were and now are ready, willing and able to perform the terms and conditions of the contract".

[1] The appellants' contentions are without merit, and the record discloses no reversible error. As pointed out in respondents' brief, the agreement of sale is clear and unambiguous; it means exactly what it says. By express terms the contract obligates the buyers to pay $100.00 or more Dollars per month on the 1st day of September, 1945 and the first day of each succeeding month thereafter". Nowhere in the instrument is there any suggestion that in the event appellants should pay more than $100 in one month, later monthly payments should be reduced by the excess. Appellants' only privilege was to pay "more" than the stipulated sum on the first of any month; no privilege to pay "less" than $100 in any one month is granted. To read such a provision into an explicit written contract would amount to imposing upon the sellers additional terms not mentioned in the written instrument and in effect would negative the provision that "time is of the essence of this contract".

The record discloses evidence to support the finding that there was no intention to waive the above provisions or that the parties adopted any other interpretation. Indeed, after default in the February payment appellants, claiming that no payment was due because of previous excess payments, appear to have made up the deficit by paying $200 in March. For the next five months thereafter, hundred dollar payments were duly made by appellants on the first of each month until the defaults of September and October.

[2] Appellants' briefs contain many references to the principles of equitable relief, and aver that great injustice will result if specific performance of the agreement of sale be not ordered. In this connection appellants allege willingness and ability to perform, and that "they have in good faith fully performed", at least substantially. It is well to bear in mind, however, that equity is concerned with the rights of both buyer and seller.

Here appellants went into immediate possession of the property upon a small payment of $100 and a promise to make regular monthly payments of a like amount. The sellers under this written contract had a right to expect such payments to be made as therein specified. Under the interpretation sought by appellants, however, respondents would be obliged to accept almost any payment tendered, on the assumption that sooner or later appellants would make up the deficit, an arrangement entirely different from that specified in the written instrument. The principles of equity, important as they are, do not comprehend such an impairment of contract obligation.

[3] The trial court had before it various conflicting contentions and evidence relating thereto. It cannot be said that the findings and judgment adverse to appellants' contentions are either unsupported by substantial evidence or contrary to law.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

102 Cal.App.2d 765

PEOPLE v. ABAIR.

Cr. 746.

District Court of Appeal, Fourth District, California.

March 9, 1951.

Theodore H. Abair was convicted in the Superior Court of San Diego County, John A. Hewicker, J., of the unlawful sale of narcotics and from the judgment of conviction and order denying his motion for new trial, defendant appealed. The District Court of Appeal, Mussell, J., held that testimony as to previous inconsistent statements was inadmissible to impeach a witness for the state, where no foundation had been laid for such impeachment.

Judgment and order affirmed.

1. Witnesses 🔑379(8), 388(8)

Transcript of testimony admitted without objection at former trial was inadmissible to impeach testimony of another witness by showing previous inconsistent statements, where no foundation for such impeachment had been laid at either trial by asking witness sought to be impeached whether he had made such inconsistent statements.

2. Witnesses 🔑379(1), 388(2, 10)

A witness may be impeached by evidence of inconsistent statements made by him at other times, but, as a foundation, such statements must be related to him, with the circumstances of times, places and persons present, and he must be asked whether he made such statements, and if so, be allowed to explain them.

3. Witnesses 🔑240(5), 388(2, 10)

The inconsistent statement sought to be proved for impeachment purposes must be one to which attention of person sought to be impeached was called by foundation questions, and proper procedure is to ask impeaching witness direct question whether alleged statements were made at times and under circumstances specified, and such question is not objectionable as being leading.

4. Witnesses 🔑388(10), 390

An impeaching question should be limited to precise conversation as to which foundation has been laid in interrogating witness sought to be impeached and it is error to permit impeaching witness to testify as to any other matter which may have been stated in conversation.

5. Witnesses 🔑206

Statements made to attorney by person charged with violation of narcotics laws pending negotiations for retaining the attorney were privileged and inadmissible over such person's objection in prosecution of another for criminal offense, though statements were made in presence of three other persons, where such persons were charged with similar violation arising out of same transaction, conversation was directed to participation of all persons in the violation and attorney indicated that he could represent all four. Code Civ.Proc. § 1881, subd. 2.

6. Witnesses ⚷199(1)

A communication made to attorney pending negotiations for retaining the attorney is privileged, even though attorney eventually refuses to accept the employment. Code Civ.Proc. § 1881, subd. 2.

7. Witnesses ⚷219(3)

Privilege to prevent disclosure of communication to attorney was not waived by failure to object at former trial to introduction of testimony as to such communications, where it did not appear that person entitled to claim the privilege had opportunity at former trial to raise an objection and such testimony apparenty was admitted upon representations to court that the conversations were not privileged. Code Civ. Proc. § 1881, subd. 2.

8. Criminal law ⚷507(1)

An "accomplice" is one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given. Pen.Code, § 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

9. Criminal law ⚷507(1)

One who allegedly purchased narcotics from defendant, though himself charged with a violation of narcotics law, was not an "accomplice" of defendant in sale of the narcotics within meaning of requirement as to corroboration of accomplice's testimony, since he was not liable to prosecution for the identical offense charged against defendant. Pen.Code, § 1111.

10. Poisons ⚷9

In prosecution for unlawful sale of narcotics, testimony of people's witness who allegedly purchased narcotics from defendant was corroborated by testimony of police officers as to activities of witness and by defendant and defendant's admission and inconsistent explanations to officers.

11. Criminal law ⚷1170½(1)

Excluding testimony that witness called by both the people and defendant had threatened to testify falsely and identify defendant as driver of automobile allegedly used in obtaining narcotics, unless paid $40, was not abuse of discretion, where defendant admitted driving the automobile on night in question so that excluded testimony could not have affected outcome of case.

◆

Bertram J. Brown, San Diego, for appellant.

Fred N. Howser, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Prosecution for unlawful sale of narcotics.

Defendant, in an amended information, was charged with the crime of sale of narcotics, a felony, alleged to have been committed on or about the 10th day of January, 1950. The information also charged defendant with a prior conviction of the unlawful possession of Marijuana. Defendant pleaded not guilty and admitted the prior felony conviction. A jury trial was had and the defendant was found guilty as charged. After his motion for a new trial was denied, he was sentenced to the State's prison.

Defendant appeals from the judgment of conviction and from the order denying his motion for a new trial.

The defendant contends that the court erred (1) In refusing to admit the testimony of an attorney on the ground that it concerned privileged communication; (2) In not instructing the jury on accomplices and that an accomplice's testimony must be corroborated; and (3) In not allowing counsel for appellant to impeach the testimony of one of the witnesses when he was called by the appellant.

Statement of Facts.

On January 5, 1950, a State Narcotic Division agent contacted one Floyd Williams for the purpose of purchasing marijuana. Williams attempted to locate a supply at several places and, not being successful, took the agent to his home near 31st and K Streets in San Diego. There he placed a telephone call to a number given him by one of his contacts and talked to a person named "Ted". "Ted" refused to bring the marijuana at that time and requested Williams to call him the next day. The following day Williams sold to the undercover agent three cans of marijuana which he had obtained from "Ted".

On the evening of January 10th, Williams called the defendant and asked him to bring six cans of marijuana. Williams was waiting for the defendant near 31st and K Streets when a car drove up, operated by another state agent, whose connection with the state office was not known to Williams. Williams went over to this car and was introduced to the agent by a person named Abbott, who was known to Williams. Shortly thereafter, the defendant and his wife drove up in a Willys sedan and parked at the back door of Williams' house. Williams proceeded to the sedan, where he found the defendant and his wife. Williams told the defendant to drive around the block while he went back to the other car to tell its occupants that he had to go to get the marijuana and told the defendant that he had a man that was going to buy six cans. Williams went back to the state car and then returned to defendant's car, getting in the back seat. After driving some distance, the defendant stopped the car at the top of a hill and obtained a sack from some bushes and handed it to Williams, who put it in the back seat of the car. This sack contained six cans of marijuana. Williams and the defendant then returned to 31st and K Streets, passing the undercover car, proceeded to the alley, parked and entered the Williams' house, where Williams poured the contents of the cans into a paper box. He then put the marijuana back into the cans, leaving a little from each can in the paper box for his own use. Williams awakened his wife, introduced her to the defendant's wife and told her that he had some marijuana in the closet; that he would be back in a few minutes. He put the six cans back into the paper sack, put the sack under his overcoat and proceeded to the undercover car, where he handed the cans which contained the marijuana to the state undercover agent, who gave him $80 therefor. Williams was then placed under arrest by the agent. Law enforcement officers, who were in the vicinity, immediately came to the scene of the arrest. These officers had witnessed the arrival of the state undercover car; they saw Williams get out of the car and walk into the alley, where he disappeared from view; saw the Willys turn into the alley and disappear; they witnessed the return of Williams to the state car and saw the Willys being driven from and return to the scene and disappear into an alley.

The officers proceeded to Williams' house, where they found the Willys sedan, then entered the house and found the defendant, his wife and Mrs. Williams therein. Mrs. Williams, when she heard the officers, retrieved the paper box from the closet and flushed most of the contents down the toilet, leaving some marijuana debris, which was recovered by the officers.

Upon being questioned, the defendant stated that his name was Ted Abair and that he had come over to sell a car to Williams; that the Willys sedan was his and that he was the only one that drove it. Defendant was taken to the police station and upon being again questioned, stated that he and his wife had gone to the Williams' house to play cards. On being asked if he brought the marijuana to the house, he stated that the officers would have to ask his attorney.

Witness Dan Abbott, who was with the undercover agent in the state car, identified the defendant and his wife as being the occupants of the Willys sedan upon both occasions when it was driven by the vicinity of 31st and K Streets.

The defendant took the witness stand in his own behalf and claimed that he had merely gone over to Williams' house to play cards; that Williams had borrowed his car and left the house; that he had nothing to do with obtaining the marijuana; that he arrived at the Williams' house about 11:30 in the evening and admitted that he had no money in his possession.

The circumstances attending the claimed error of the trial judge in refusing to admit the testimony of an attorney on the ground that it concerned a privileged conversation were as follows: At the former trial of the instant action in which the jury disagreed, the defense was permitted to introduce the testimony of an attorney who had a conversation in his office with Williams and the defendant and their respective wives. The attorney testified, in substance, that at this conference Williams had exonerated the defendant from any complicity in the offense with which he was charged; that Williams stated that the defendant and his wife did not know anything about the marijuana transaction at all and had not been in the Willys car when he, Williams, used it; that the defendant and his wife were at the Williams home on the night of January 10th for the purpose of playing cards. The record reveals that the defendant and Williams at the time of this conversation were subject to the charge of illegal possession of narcotics arising out of the transaction whereby the defendant sold marijuana to Williams on January 10th. The defendant had retained attorney Hervey when he met Williams, who was then seeking the services of an attorney. The defendant invited Williams to make use of the services of his attorney if he were unsuccessful in hiring his own counsel. As a result of this suggestion, the conference took place in the attorney's office. It further appears that the conversation was all concerning the transactions in which all parties seemingly had been engaged and for which they were liable for criminal prosecution. It further appears that at the conference Williams stated to attorney Hervey that he was interested in engaging his services to represent him and his wife, as well as the Abairs at the preliminary examination and that attorney Hervey told Williams that he saw no reason why he should not represent both he and the defendant and that the fee would be $350 for the preliminary examination.

The record of the testimony taken at the previous trial leading up to the introduction of the testimony of attorney Hervey is not before us, but it is apparently conceded that there was no objection then made to such testimony by anyone, nor does it appear from the record that Williams was present in court or was being questioned when the attorney's testimony was introduced or that Williams was afforded any opportunity to object to the introduction of such evidence.

[1] At the second trial, while Williams was on the stand and being cross-examined, he was asked if he recalled talking to Mr. Edgar Hervey, an attorney, in his office and his answer was that he did. Mr. Brown, counsel for the defendant, then asked Williams to read certain testimony taken at the preliminary examination. The trial court then informed Williams that the communication made by him to attorney Hervey was privileged and that it could be objected to on that ground. The deputy district attorney then objected to the reading of the testimony to the witness on the ground that there was no foundation laid. Witness Williams then objected on the grounds that it was a privileged communication and the objection was sustained by the court. No further questions were then asked Williams as to the statements made to attorney Hervey and the witness was excused. Subsequently, defendant's counsel called attorney Hervey and attempted to introduce evidence of the communications made to him by Williams. Williams, who was then in court but not on the witness stand, was asked if he objected to Mr. Hervey stating any of the conversation that was held in his office and Williams replied in the affirmative. The objection was sustained and the counsel for the defense then offered the testimony of attorney Hervey taken at the first trial. The court denied its admission into evidence. It is apparent that the offered testimony was inadmissible for impeachment purposes.

[2] As was said in People v. Collup, 27 Cal.2d 829, 836, 167 P.2d 714, 717: "It is undoubtedly the general rule that: 'A witness may also be impeached by evidence that he has made, at other times, statements inconsistent, with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them.' Code Civ.Proc. § 2052."

[3,4] And as was said in People v. Malicoat, 89 Cal.App.2d 742, 745, 201 P.2d 850, 852: "'It is indispensable to a valid impeachment on the score of inconsistent statements that the statement sought to be proved be the one to which the attention of the person sought to be impeached was called by the foundation questions. The proper and usual procedure is to ask the impeaching witness the direct question whether the alleged statements were made at the time and under the circumstances specified, and such questions are not objectionable as being leading.' 27 Cal.Jur., Witnesses, sec. 139, p. 166; McLaughlin v. Los Angeles Ry. Corp., 180 Cal. 527, 539, 182 P. 44. Counsel should be careful to limit the impeaching question to the precise conversation as to which the foundation has been laid in interrogating the witness sought to be impeached. It is error to permit the impeaching witness to testify to any other matter which may have been stated in the conversation."

In Burns v. California Milk Transport, 89 Cal.App.2d 70, 74, 200 P.2d 43, 45, the court, quoting from Rignell v. Font, 90 Cal. App. 730, 737, 266 P. 588, said: "'It would be eminently unfair to a witness to seek to impeach him without calling his attention to the specific statements which it is claimed he has fabricated, and giving him an opportunity to explain or correct the alleged discrepancy. This is absolutely necessary before one may impeach either his own or an adverse witness.' The methods prescribed in the code for impeaching a witness are exclusive, and, in general, are applied strictly. People v. Holman, 72 Cal. App.2d 75, 97, 164 P.2d 297, and cases cited."

[5] Furthermore, the record indicates that Williams went to see attorney Hervey for the purpose of employing him as his attorney and that the conversation concerned charges which Williams was then facing and involving the transaction with the defendant on January 10th. Since the communication by Williams to attorney Hervey was made pending negotiations for the latter's retention as attorney, it was privileged under section 1881, subdivision 2 of the Code of Civil Procedure.

[6] In People v. Dorrance, 65 Cal.App. 2d 125, 129, 150 P.2d 10, the rule stated is that when the communication is made pending negotiations for retaining the attorney it is privileged, notwithstanding that the attorney's acceptance of the employment is eventually refused.

In Estate of Dupont, 60 Cal.App.2d 276, 288, 140 P.2d 866, 872, the court said: "It is the almost universal rule in common-law jurisdictions that 'Where a person consults an attorney with a view to employing him professionally, any information acquired by the attorney in the course of interviews or negotiations looking toward such employment is privileged and cannot be disclosed, even though no actual employment of the attorney as such follows, and notwithstanding the attorney may be afterward employed by the adversary of the person who made such communication.' 70 C.J. 406; 8 Wigmore on Evidence, 3d Ed. (1940) sec. 2304, pp. 587, 588; 5 Chamberlayne, Modern Law of Evidence (1916) sec. 3682, p. 5266; cases collected in notes in 21 Ann. Cas. 217; Ann.Cas. 1913A. 30; and [Evans v. State, 5 Okl.Cr. 643, 115 P. 809] 34 L.R. A.,N.S., 578, 579."

It is argued that because the conversation was held in the presence of the appellant and his wife, the privilege was waived. However, all four of the parties present at the conversation were charged with violation of the narcotics laws arising out of the sale of marijuana to Williams on January 10th, and the conversation was directed in some degree to the participation therein by the four persons present. Attorney Hervey at the time indicated that he could represent all four of the parties present and under such circumstances, we conclude that their communications to him, as far as concerns strangers, were privileged. In re Bauer's Estate, 79 Cal. 304, 312, 21 P. 759; De Olazabal v. Mix, 24 Cal.App.2d 258, 262, 74 P.2d 787; Croce v. Superior Court, 21 Cal.App.2d 18, 20, 68 P.2d 369.

[7] The argument is advanced that the failure of the witness Floyd Williams or counsel for the People to object to the offered testimony at the first trial amounted to a waiver of the privilege, if any ever existed. However, as heretofore noted, it

does not appear that Williams had an opportunity at the first trial to voice an objection and the testimony apparently was admitted in view of representations of counsel to the court that the conversations were not privileged. Under the circumstances shown, there was no waiver of the privilege.

[8, 9] Defendant complains that the trial judge erred in refusing to instruct the jury as to the law relating to accomplices and the requirement that an accomplice's testimony must be corroborated. Section 1111 of the Penal Code defines an accomplice as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given. The information charged the defendant with the sale of narcotics and there was substantial evidence that this sale was made to Williams. Under the definition set forth in the Penal Code section, Williams, being the purchaser, was not liable to prosecution for the identical offense charged against the appellant, who was guilty of selling. It appears that Williams was charged with and pleaded guilty to violations of the narcotics laws but not that he was charged with the unlawful sale alleged against the defendant. It appears, therefore, that there was no error in refusing the requested instructions. Where, as here, the purchaser of the narcotics testified against the seller, there were two distinct crimes committed. People v. Galli, 68 Cal.App. 682, 684, 230 P. 20; People v. Lein, 204 Cal. 84, 86, 266 P. 536; People v. Lima, 25 Cal.2d 573, 578, 154 P.2d 698.

[10] Defendant contends that the testimony of Williams is not corroborated. This contention is without merit. The activities reported by Williams were corroborated by the police officers who saw the defendant's car when it picked Williams up and returned with him. They found the car parked outside of Williams' house and the defendant and his wife in the Williams home. Defendant admitted to them that he was the driver of the car and witness Abbott identified the defendant as such on both occasions to the Williams' house. Defendant, in explaining his presence at the Williams' house on the night of January 10th, told inconsistent stories. At one time he said he went there to sell a car, and at another stated he went there to gamble, neither of which statements were apparently true.

[11] Finally, it is contended that the court erroneously refused to permit counsel for the defendant to testify in impeachment of a witness called by both the People and the defendant. The record shows that the evidence sought to be introduced was to the effect that the witness Abbott told Williams' attorney that unless the defendant gave him $40, he would testify falsely in court and that he saw the defendant driving the Willys sedan on the night of January 10th. The testimony sought to be introduced, if erroneously excluded, could not have affected the outcome of the case, as the defendant had admitted driving the car on the night in question. Under the circumstances shown by the record, the trial court did not abuse its discretion by refusing to permit the offered testimony.

Judgment and order affirmed.

GRIFFIN, Acting P. J., concurs.

102 Cal.App.2d 839

WATERFORD IRR. DIST. v. STANISLAUS COUNTY.

Civ. 7836.

District Court of Appeal, Third District, California.

March 15, 1951.

Hearing Denied May 10, 1951.

The Waterford Irrigation District (an irrigation district) brought action against the County of Stanislaus to recover tax paid by plaintiff under protest. The Superior Court of Stanislaus County, R. R. Sischo, J., rendered a judgment for the defendant, and the plaintiff appealed. The District Court of Appeal, Van Dyke, J., held that plaintiff's water right which was merely a right to divert water from river, was "land" within meaning of constitutional provision that land and improvements located outside county, city and county, or municipal corporation, and taxable at time of acquisition by county, city and county, or municipal corporation, shall not be exempt from taxation, and that taxation of plaintiff did not constitute double taxation.

Judgment affirmed.

1. Taxation ⚷217

The property of an irrigation district is exempt under the constitution from taxation except as it may consist of lands and improvements thereon which are located without its boundaries, and which were, at the time of acquisition by the district, subject to taxation. Const. art. 13, § 1.

2. Taxation ⚷217

Purpose of constitutional provision that land and improvements located outside county, city and county, or municipal corporation, and taxable at time of acquisition by county, city and county, or municipal corporation, shall not be exempt from taxation, is to protect from loss of taxable properties those counties in which municipalities acquire property for operation of various municipal projects. Const. art. 13, § 1.

3. Taxation ⚷217

Water right of irrigation district which was merely a right to divert water from river, and not a riparian right nor appurtenant to any land, constituted "land" within meaning of constitutional provision that "land" and improvements located outside city, city and county, or municipal corporation, and taxable at time of acquisition by county, city and county, or municipal corporation, shall not be exempt from taxation. Const. art. 13, § 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Land".

4. Taxation ⚷47(1)

Tax imposed on water rights of irrigation district by county did not constitute improper "double taxation" because of county assessed land located within the district at valuations running from $60 to $130 an acre as contrasted with valuations of $11 to $16.50 an acre on comparable land outside of district.

Minasian & Steadman, Oroville, for appellant.

Frederick W. Reyland, Jr., County Counsel, Wm. R. Mitchell, Asst. County Counsel, Modesto, for respondent.

VAN DYKE, Justice.

Respondent, County of Stanislaus, in the year 1948 levied a tax upon a right owned by the appellant, Waterford Irrigation District, to divert water from the Tuolumne River. The tax was paid under protest and appellant district thereupon brought action in the Superior Court of Stanislaus County for recovery of the sum so paid. The trial court sustained respondent county's general demurrer, without leave to amend, and the question presented by this appeal is whether or not the complaint states a cause of action.

The complaint alleges the following matters: That in 1920 the district purchased the water right in question from the Sierra and San Francisco Power Company; that the district owns no reservoir or facilities for storing water and that its water right is merely a right to divert part of the natural flow of the Tuolumne River, which right was based on appropriation and was never a riparian right nor appurtenant to any land; that by the district's acquisition and holding of the water right the county was at no time deprived of any tax revenue nor was taxable property removed from its tax rolls; that the water is diverted from the river at a point known as the La Grange Dam in Stanislaus County, but that the dam and the land adjacent thereto are owned, not by appellant district, but by the Modesto and Turlock Irrigation Districts; that appellant district owns no land whatever at or near the diversion point nor any interest in La Grange Dam or in the point of diversion; that the water is diverted along with water being diverted for the use and in the right of the other two irrigation districts, which latter districts own the canal leading from the point of diversion; that appellant district's rights therein consist only of the right to have the water flow through the canal along with the water diverted by the other two districts until it reaches points where it is again diverted from said canal into diversion canals owned by appellant district through which the water is carried to land within said district.

Article XIII, Section 1, of the Constitution of California provides that all property in the State, except as otherwise in the Constitution provided, and which is not exempt under the laws of the United States, shall be taxed. It defines property as including moneys, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal and mixed capable of private ownership. It then exempts from taxation property belonging to the State or to any county, city and county or municipal corporation within the State; but from the operation of this exemption there is excepted "such lands and improvements thereon located outside of the county, city and county or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation".

In Rock Creek Water District v. County of Calaveras, 29 Cal.2d 7, 172 P.2d 863, the Supreme Court held that a water district was a municipal corporation as that term is used in the constitutional provisions above referred to. It expressly overruled Turlock Irrigation District v. White, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72, which had held that an irrigation district was not a municipal corporation within the meaning of the same constitutional provision. Although the governmental agency before the court in the Rock Creek case was a water district, it is apparent, from a reading of the opinion, that no distinction was to be drawn between water districts and irrigation districts. Following that decision of the Supreme Court, the District Court of Appeal for the Fourth District, in the case of Imperial Irrigation District v. County of Riverside, 96 Cal.App.2d 402, 215 P.2d 518, held directly that an irrigation district was a municipal corporation within the meaning of the constitutional provisions referred to and the Supreme Court denied the district's petition for a hearing in that court.

Accepting the force and effect of these decisions, the last one having been rendered after this appeal was initiated, the appellant here claims that notwithstanding it is to be deemed a municipal corporation and that its property may therefore under certain circumstances be taxable, yet the tax in question here is still void for two reasons: First, the appellant says that the tax is void because the water right is not land nor an improvement thereon, and therefore does not come within the exception to tax exemption stated in the constitution. Next, the appellant contends that to permit the collection of the tax in quesion is to permit double taxation.

[1] In the beginning it is to be observed that not all property of an irrigation district considered as a municipal corporation is taxable. In fact, it is exempt from taxation except as it may consist of lands and the improvements thereon located without its boundaries and which were at the time of acquisition by the district subject to taxation. There is no contention advanced that when the water right in question was purchased by appellant district from the Sierra and San Francisco Power Company, a corporation, that the same was not then subject to taxation. But appellant contends that the property so taxed, that is, the water right, being an appropriative right and not riparian to nor appurtenant to any land, does not constitute land nor improvement on land within the meaning of those terms as used in the constitutional provisions. This precise point has not, so far as we have been able to learn, been heretofore presented to any appellate court. In the Rock Creek case, supra, it appears from the statement of facts contained in the opinion that the plaintiff district there owned "property situated in defendant taxing county consisting of a dam, reservoir, water rights and easement for ditches, canals and pipe lines" and that "Defendant levied a property tax on that property which plaintiff paid under protest." [29 Cal.2d 7, 172 P.2d 864.] However, the precise point raised here was not discussed in the opinion, and apparently was not before the court as a separate question distinct from the general question as to the taxability of the water district's property.

In the case of City and County of San Francisco v. County of Alameda, 5 Cal.2d 243, 54 P.2d 462, 464, the question of the taxability of water rights owned by a municipal corporation was before the court, but the water rights there involved originated as riparian rights which had been purchased by the city. After declaring the general purpose of the constitutional provisions excepting certain property or municipal corporations from the general constitutional rule of non-taxability as being to safeguard the tax revenues of smaller counties wherein large municipal corporations had purchased or would acquire extensive holdings which would, except for the constitutional provision, be exempt from local taxation, the court declared:

"* * * The question is whether the water rights acquired by the plaintiff by purchase from the Spring Valley Water Company were included within the term 'land' as used in the constitutional amendment, and, as such, therefore separately assessable in Alameda county.

"The case was tried on a stipulation of facts from which it appears that the rights acquired by the Spring Valley Water Company were rights to divert the water of Alameda creek as against lands riparian to the creek. While the right to the waters of the stream is a usufructuary right inuring to the benefit of riparian lands, such rights are inseparably annexed to the soil and pass with a grant of the land, not necessarily as an easement or appurtenance but as parcel of the land itself. [Citing Miller & Lux, Inc., v. J. G. James Co., 179 Cal. 689 (178 P. 716).] When the owner has divested himself of a right such as here assessed to the plaintiff, he has parted with an interest in the land as contemplated by the constitutional amendment. It must be assumed that by the grant he has stripped the land of much of its value. In some cases the value of the land severed from the water right might well be negligible for taxing purposes. In such event the county wherein it is situated would be deprived of tax revenues from it the same as if the owner had conveyed to the municipality the title to the land. Such a result would subvert the purposes of the constitutional amendment and render the same ineffectual for the purposes intended.

"The conclusion seems irresistible that when the water rights were owned by the riparians, they were a part of the land itself and formed an important element in the valuation of the land for taxing purposes; that when those rights were severed from the land the valuation of the land for purposes of taxation was or might be materially reduced, and when so severed they should not lose the characteristics which had theretofore attached to them, taking into consideration the objects and purposes of the constitutional amendment. When acquired by the plaintiff they should therefore be deemed to retain those characteristics the same as when owned by the plaintiff's predecessor in interest."

It is evident, we think, from the foregoing that the holding in the opinion quoted from was primarily based upon the stipulated fact that the water rights there taxed were riparian in origin; and the holding that they were embraced within the meaning of the word "land" as used in the Constitution was arrived at by considering the original nature of those rights as having been part and parcel of the riparian lands. It seems therefore that neither of the cases referred to is decisive of the point presented here, for it is alleged that the water right taxed by the respondent county herein was never riparian, but arose by appropriation and was never appurtenant to any lands.

The nature of a water right by appropriation is discussed at length in Wiel on Water Rights in the Western States, 3d edition. In Section 288 the author formulates the following definition: "A water-right of appropriation is real estate, independent of the ditch for carrying the water, and independent of ownership or possession of any land and independent of place of use or mode of enjoyment, whereby the appropriator is granted by the government the exclusive use of the water anywhere so long as he applies it to any beneficial purpose; and it is an incorporeal hereditament, solely usufructuary, not conferring ownership in the corpus of the water or in the channel of the stream."

In Section 283 the author stated:

"The right to the flow and use of water, being a right in a natural resource, is real estate. [Hill v. Newman, 5 Cal. 445.] * * * The statute of frauds, concerning conveyances of real estate, applies to it, and transfers must be by deed. [Griseza v. Terwilliger, 144 Cal. 456, 77 P. 1034; Smith v. O'Hara, 43 Cal. 371; Oneto v. Restano, 78 Cal. 374, 20 P. 743; Dorris v. Sullivan, 90 Cal. 279, 27 P. 216; Hayes v. Fine, 91 Cal. 391, 27 P. 772.] The statute of limitations concerning land applies to it. [Yankee Jim, etc. Co. v. Crary, 25 Cal. 504.] So do the recording statutes, as between successive conveyances. [Partridge v. McKinney, 10 Cal. 181; Lyles v. Perrin, 119 Cal. 264, 51 P. 332.] The right to have water flow from a river into a ditch is real property. [Lower Kings River W. D. Co. v. Kings River & F. C. Co., 60 Cal. 408, 410.] * * * The right to take water from a river and conduct it to a tract of land is realty. [South Tule, etc. Co. v. King, 144 Cal. 450, 454, 77 P. 1032.] The right to have water flow through a pipe from a reservoir to and upon a tract of land is an appurtenance to the land. [Standart v. Round Valley Co., 77 Cal. 399, 403, 19 P. 689.] An undivided interest in a ditch and in the right to water flowing therein is real property. [Hayes v. Fine, supra.] And where one person has a right to the flow of water and another has the right to have a part of such water flow to his land for its irrigation, the right of the latter is real property. [Dorris v. Sullivan, supra; see also Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 P. 858, 15 L.R.A.,N.S., 359.] Ditches and water-rights may be sold on execution as real property. [Gleason v. Hill, 65 Cal. 17, 18, 2 P. 413.] * * * And an action to settle rights is one to quiet title to realty. [Taylor v. Hulett, 15 Idaho 265, 97 P. 37, 19 L.R.A.,N.S., 535.] In Idaho water-rights are declared real estate by statute. * * *

"That the usufructuary right to the flow and use of a natural stream by appropriation is real property is fully recognized. * * *"

Concerning taxation the same author, in Sections 284 and 285, has the following to say:

"For convenience, we state here some matters regarding taxation of ditches and water-rights.

"Water-rights are real estate for the purposes of taxation, but should not be assessed separately from the lands to which (if any) they are appurtenant. * * *

"A water-right by appropriation is not only real estate, but has all the dignity of and is an estate of fee simple, or a freehold. It was not always accepted as such in the early days, however. This historical denial that the estate was a freehold we have already traced at much length in the historical chapters; how, before the act of Congress of 1866, it was strenuously urged that the appropriators had no right at all, but were trespassers on the public lands, the United States being the real owner of the right to the water; how the right hence took on many features of a possessory character; how the early cases nevertheless gave to the rights of the pioneers all the recognition and force of freehold estates; and how Congress ratified this by the act of 1866. All doubts were put at rest by that act; and ever since all the freehold remedies are allowed the appropriators in the courts, and their rights have ever since had all the attributes of freehold realty. * * *"

We have inserted the foregoing quotations from Wiel on Water Rights not because we are here primarily concerned with the particular conclusions of the learned author, nor with the exact determinations made by courts, which have many times been conflicting, but in order to determine what was the common concept as to the nature of appropriative water rights when in 1914 the people inserted into Article XIII, Section 1, of the Constitution the exception to the general rule of non-taxability of public property with which we are here concerned. The problem before us is one of interpretation and the precise thing to be determined is whether or not when the people excepted "land and improvements thereon" from the general exemption they intended to include appropriative water rights within the meaning of those words as used by them.

[2] Generally, the approach which must be made when interpreting this part of the Constitution has been defined unequivocally by the Supreme Court in the Rock Creek Water District case, supra, wherein the court said: "It is fundamental that the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in its interpretation. * * * And that is true of the constitutional provision here involved. * * * The purpose of clause 2 is 'to protect from the loss of taxable properties those countries in which municipalities acquire property for the operation of various municipal projects. * * * Prior to the amendment, the property of municipalities lying outside their corporate boundaries was exempt from taxation and that resulted in many instances in the county in which such property was situated losing large sources of revenue, a loss which it could ill afford. The aim of the amendment was to eliminate that condition.' * * * And in line with that policy the term municipal corporation must be given a broad meaning unrestrained by the strict technical sense of the term. * * *" [29 Cal.2d 7, 172 P.2d 865.]

Quoting and adopting principles declared by Mr. Justice Sloane in his dissenting opinion in Turlock Irr. District v. White, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72, the court said:

"'The direct object of the amendment was to protect and conserve the revenues of the invaded territory, and with that object in view it can make no difference whether the public use acquired is by a city or county, or some other public corporation exercising municipal functions.

"'No violence is done to the rules of construction under the interpretation of the term "municipal corporations" here contended for. It is common knowledge that in popular usage the term "municipal corporation" is understood as applying to all departments of state organization exercising public functions, and the same general use of the term is common in judicial decisions and with law text-writers. * * *'"

The same guiding rules for interpretation of the constitutional amendments were declared in City and County of San Francisco v. County of Alameda, supra, the court saying: "The undoubted purpose of the amendment was primarily to safeguard the tax revenues of smaller counties wherein large municipal corporations had purchased, or would acquire, extensive holdings and which would, except for the amendment, be exempt from local taxation. With the exemption in force, the serious financial embarrassment of the counties in which the holdings were situated was a reality. * * * The adoption of the amendment was evidence that the acquisition of such lands and water rights should be without prejudice to the outlying counties whose existence from an economic and governmental standpoint depended upon the tax revenues derived therefrom. It was therefore provided that such lands and improvements thereon as were taxable at the time of the acquisition of the same by municipalities should continue to be taxable and should not be exempt from local taxation. The fact that the continuing right of taxation should in some instances inure to the benefit of counties not so sorely pressed by reason of the prior exemption, is but an incident and cannot disturb the manifest and general operation of the amendment." [5 Cal.2d 243, 54 P.2d 464.]

[3] Applying these rules of interpretation so clearly and recently declared by the Supreme Court, and bearing in mind the purposes of the amendment and what we believe to be the common concept of the nature of appropriative water rights, we conclude that they constitute land, as that term is used in the Constitution.

[4] Turning now to the second contention advanced by the appellant district, which is that if the appropriative water right owned by the district be taxable that nevertheless the tax here levied is void as constituting double taxation, this matter was presented in a separate cause of action contained in the complaint of the appellant and is claimed to be based upon the follow-

ing facts as appear from the allegations of that count: In 1948 the County of Stanislaus assessed the land in the appellant district at valuations running from $60 to $130 per acre as contrasted with valuations of $11 to $16.50 per acre on comparable land outside of the district. It is alleged that this difference is due to the fact that the land in the district can receive irrigation whereas land outside the district cannot. And it is pointed out that this increase in valuation, figured on the 10,000 assessable acres in the district, would amount to approximately $817,500 and a tax income in 1948 to the County of Stanislaus of approximately $47,500. It is alleged the landowners in the district paid this tax and it is further alleged that none of the land within the Waterford Irrigation District was assessed by the County of Stanislaus in the said fiscal year as land exclusive of water right. It is argued that the landowners by the increased valuations on their lands have paid the tax on the lands and on the water right in question and that illegal double taxation has occurred. It is pointed out that the district has no source of revenue other than assessments levied upon the lands within its boundaries and consequently the district, to raise funds to pay the tax levied against it, was required to levy assessments on the same lands that were assessed directly by the county for the water right in the form of increased valuation and taxes on their land due to its benefits.

We think this contention of double taxation cannot be sustained. In Redwood Theatres v. City of Modesto, 86 Cal.App.2d 907, 920, 196 P.2d 119, 127, this court upon the question of double taxation declared: "* * * In the text of 51 American Jurisprudence, at page 337, supported by numerous authorities, it is said that 'before invalid double taxation may be said to exist, both taxes must have been imposed in the same year, for the same purpose, upon property owned by the same person, and by the same taxing authority.'"

The right here taxed, that is, the appropriative water right, is alleged to have been purchased by the appellant district from its previous owner and we think that, within the meaning of the constitutional exception, it is owned by that district. Taxes levied upon it therefore are not taxes upon the property of the landowners within the district, and consequently the tax fails to meet the test of double taxation, not being a tax upon property owned by the same person.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; EDMONDS, J., dissenting.

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102 Cal.App.2d 859

ÆTNA CARPET CO. v. PENZNER et al.

Civ. 17852.

District Court of Appeal, Second District,
Division 3, California.
March 16, 1951.

Action by the Aetna Carpet Company against William L. Penzner, A. Penziner, and others to recover for merchandise sold. From a judgment for plaintiff in the Superior Court of Los Angeles County, H. J. Borde, J., assigned, the defendants appealed. The District Court of Appeal, Bartlett, J., pro tem., held that denial of allegations in answer that the carpet was delivered was not new matter necessitating affirmative defense.

Judgment reversed.

1. Witnesses 🔑269(2)

Where a witness testified on direct examination that defendants had been sold a white carpet and that the carpet had been delivered, cross-examination whether or not the carpet sold was in fact delivered was proper.

2. Pleading 🔑382(1)

In action to recover for carpet sold where plaintiff pleaded that the carpet was delivered denial of allegations in the answer was not new matter, necessitating an affirmative defense.

3. Pleading 🔑382(1)

In an action on a common count, under a general denial, defendant may urge any defense tending to show that plaintiff had no right to recover or to recover to the extent that he claims.

S. Dell Scott, North Hollywood, for appellants.

Simon, Fox & Fraider and A. David Kagon, all of Beverly Hills, for respondent.

BARTLETT, Justice pro tem.

The complaint in this action was on a common count and alleged: "That within two (2) years last past, immediately prior to the commencement of this action, the defendants became indebted to the plaintiff in the sum of Two Thousand Five Hundred Seventy Dollars ($2570.00) for goods, wares and merchandise sold and delivered by the plaintiff to the defendants, at the special instance and request of the defendants." The answer generally and specifically denied this allegation.

The first witness called at the trial of the action was the general manager of the plaintiff, who is the respondent herein. He testified that the defendants, the appellants herein, came to his establishment to buy a carpet and that, among other carpets, he showed them a white carpet and they told him that they wanted to purchase it. An agreement was then entered into beween them that it would be sold to defendants at $18.50 a yard, laid and padded. He then testified that pursuant to this agreement a white carpet was delivered. Appellants asked him if he was positive that the property delivered was a white one and he replied that he was. Appellants then attempted to cross-examine him further as to whether the carpet sold was the carpet which had been delivered by respondent. Their attorney showed the witness a piece of carpet of a different color and asked him if he recognized that as the carpet that had been laid. The witness said he did not. No objection was made to this line of cross-examination but the court interrupted the examination and in unequivocal terms told the appellants that it would not permit them to show that the goods that were delivered were not the goods that were purchased, as no such defense had been pleaded. The appellants then requested leave to amend their answer to set up these facts. This request was summarily denied. Later in the trial appellants again brought up the matter and the court again ruled that they could not, under the pleadings, introduce such evidence.

[1–3] The question before us is epitomized by respondent in his brief in these words: "Appellants contend that such a defense is not 'new matter' necessitating an affirmative defense. The trial court and the respondent are of the view that such a defense is new matter." With this latter contention we do not agree. We are of the opinion that the ruling of the court constituted prejudicial error. The witness had testified that the defendants had been sold a white carpet and was equally positive that the carpet selected had been delivered. Having testified that a white carpet had been delivered it was certainly proper cross-examination to question the witness as to whether or not the carpet sold was, in fact, delivered. Respondent having pleaded that it was and having testified that it was, the proof of this matter was therefore clearly within the issue, was so placed by the allegations of the complaint, the denial of these allegations in the answer, and was not new matter. In an action upon a common count under a general denial the defendants may urge any defense tending to show that the plaintiff has no right to recover or to recover to the extent that he claims. DeSantis v. Miller Petroleum Co., 29 Cal. App.2d 679, 683, 85 P.2d 489; Heaton-Hobson Associated Law Offices v. Arper, 145 Cal. 282, 284, 78 P. 721; Evans v. Zeigler, 91 Cal.App.2d 226, 230, 204 P.2d 902; Bridges v. Paige, 13 Cal. 640.

In support of respondent's contention that the testimony sought to be elicited from respondent's general manager was new matter and should have been pleaded to make it admissible it cites but one case in its brief, that of American Steel Pipe & Tank Co. v. Hubbard, 42 Cal.App. 520, 183 P. 830. The case cited was an action on a written contract for the sale of orchard heaters. The defendant attempted to introduce evidence that water leaked into the heaters when it rained which fact constituted a violation of an implied warranty under section 1770 of the Civil Code. The court said, 42 Cal.App. at page 523, 183 P. at page 831: "As to this contention, it is sufficient to say that defendant's pleading contains no defense predicated upon a violation of an implied warranty." No such question is presented in the matter before us.

As this case must be remanded for a new trial no useful purpose would be served by a consideration of the question raised by appellants as to the sufficiency of the evidence to sustain a holding as to the status of the agency of one of the defendants or as to whether or not the evidence is sufficient to support the judgment. At any new trial of this action the parties should be allowed to amend their pleadings if they be so advised.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

102 Cal.App.2d Supp. 954

PEOPLE v. McCORMICK.

PEOPLE v. STEINBERG.

C. A. 2686, 2695.

Appellate Department, Superior Court,
Los Angeles County, California.
Feb. 27, 1951.

Mrs. La Rue McCormick and Henry Steinberg were charged with having failed to register as alleged members of a Communist organization, as required by county ordinance. The Justice's Court of San Antonio Township, Stanley Moffatt, J., and the Justice's Court of Belvedere Township, Myer B. Marion, J., rendered judgments sustaining demurrer to the complaints, and the People of The State of California appealed. The Appellate Department of the Superior Court, Bishop, J., held that ordinance was invalid because violative of constitutional provision that no person shall be compelled in any criminal case to be a witness against himself.

Judgments affirmed.

1. Criminal law ⇨393(1)

County ordinance which requires under penal sanctions that any person who belongs to an organization that purposes to substitute the economic system known as communism for present system and to overthrow present form of government and replace it with a dictatorship, and which purposes to accomplish those purposes not by constitutional means but by terrorism and sabotage must file an affidavit with the sheriff, giving his name and name of organization, is unconstitutional as violative of provision of state constitution that no person shall be compelled, in any criminal case, to be a witness against himself, since compliance with ordinance would amount to a virtual confession that registrant had violated the Criminal Syndicalism Act. Gen. Laws, Act 8428, §§ 1, 2, subd. 4; Const. art. 1, § 13.

2. Criminal law ⇨393(1)

Provision of the fifth amendment to the federal constitution that no person shall be compelled in any criminal case to be a witness against himself, was not applicable to county ordinance. U.S.C.A.Const. Amend. 5.

3. Courts ⇨95(2), 97(6)

State court, in interpreting provision of state constitution that no person shall be compelled in any criminal case to be a witness against himself, may look to the interpretation given in federal cases and in cases in sister states as an aid to an understanding of the provision. U.S.C.A.Const. Amend. 5; Const. art. 1, § 13.

4. Criminal law ⇨393(1)

Constitutional provision that no person shall be compelled in any criminal case to be a witness against himself means that no person shall be compelled to make any statement, orally or in writing, anywhere or at any time, which may be made use of against him in any criminal prosecution, then pending or which might thereafter be brought against him. Const. art. 1, § 13.

5. Counties ⚷21½

The Appellate Department of the Superior Court should not lightly agree that county ordinance is invalid, and must be sure of its ground before declaring ordinance unconstitutional.

6. Criminal law ⚷393(1)

In view of constitutional provision that no person shall be compelled in any criminal case to be a witness against himself, one cannot be required to speak if, by so doing, he might furnish a link in the chain by which a conviction might hang. Const. art. 1, § 13.

7. Criminal law ⚷393(1)

In view of constitutional provision that no person shall be compelled in any criminal case to be a witness against himself, a county ordinance may not, constitutionally, require a person to state a fact which might incriminate him with respect to a state created felony. Const. art. 1, § 13.

◆

W. E. Simpson, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty., and Ralph F. Bagley, Deputy Dist. Atty., Los Angeles, for appellant.

Margolis & McTernan, Los Angeles, for respondents.

Harold W. Kennedy, County Counsel, Gerald G. Kelly, Asst. County Counsel, Robert L. Trapp, Deputy County Counsel and Arvo Van Alstyne, Deputy County Counsel, Los Angeles, amici curiae, in support of appellant's position.

A. L. Wirin, Fred Okrand and Edmund W. Cooke, Los Angeles, Ibanez & Snider and Frank Pestana, Hollywood, Robert W. Kenny, Los Angeles, Edward Mosk, Hollywood, George Altman, Charles J. Katz, Herbert Ganahl, Eleanor Jackson and Richard L. Rykoff, Los Angeles, amici curiae, in support of respondents' position.

BISHOP, Judge.

[1] The proceedings in each of these cases ran the same course. Each defendant was charged with having failed to register as a member of a Communist organization, as required by county ordinance number 5578. A demurrer was filed to each complaint and sustained on the ground that the provisions of the ordinance, alleged to have been disobeyed, were without force because of constitutional restrictions. From the judgment of dismissal that followed in each case, the People have appealed. We have reached the conclusion that the ordinance violates the principle written into the Bill of Rights of the Federal Constitution, Amendment V, which "is found in the constitution of every state in the country" Ex parte Cohen, 1894, 104 Cal. 524, 527, 38 P. 364, 365, 26 L.R.A. 423, and which is given this expression in section 13, Article I, of our State Constitution: "No person shall * * * be compelled in any criminal case, to be a witness against himself". It inevitably follows that we find the ordinance to be without validity and, as a consequence, hold that the dismissals of the complaints based upon it were proper.

[2, 3] We referred to the Fifth Amendment to the Federal Constitution. That amendment has not yet been incorporated into the Fourteenth Amendment, so it does not affect the ordinance in question, Adamson v. People of State of California, 1946, 332 U.S. 46, 51–55, 67 S.Ct. 1672, 91 L.Ed. 1903, 1908–1910 any more than do the like provisions in the constitutions of our sister states. The widespread appearance of the prohibition against self-incrimination was noted to indicate that it is a thoroughly settled policy in the American system of justice, and that we may look to the interpretation given in federal and other cases as an aid to an understanding of the words quoted from our constitution.

[4] At first glance, the provision in question does not appear to touch the situation covered by the ordinance. The ordinance—we shall look into some of its terms more clearly a bit later—only requires those covered by its provisions to register with the sheriff. It does not purport to compel any one to be a witness in a criminal case, nor does it deal with people who are witnesses in criminal cases. Such observations, however, miss the point of the provision entirely. The words, "No person shall * * * be compelled, in any criminal case, to be a witness against himself" mean that no person shall be compelled to make

any statement, orally or in writing, anywhere or at any time, which may be made use of against him in any criminal prosecution, then pending or which might thereafter be brought against him. With almost complete unanimity the cases find in the words more than is literally there. The protection afforded includes but goes beyond the assurance to a defendant on trial in a criminal case that he will not be compelled to testify against himself. The protection intended applies even before the commencement of a criminal case and secures one who may reasonably be expected to be a defendant from furnishing ammunition to be used against him.

[5] It is important that the meaning of the provision we are considering be correctly understood, for we know that we should not lightly agree that the county ordinance is invalid; we must be sure of our ground before we declare that the attempt it makes to contribute to the solution of a difficult problem is a futile gesture. We find the meaning of the provision made clear in many cases. In Ex parte Clarke, 1894, 103 Cal. 352, 37 P. 230, the petitioner had been imprisoned because he refused to answer questions put to him in a proceeding initiated by his assignee in insolvency, the object of which inquiry was to ascertain whether or not the petitioner had concealed assets which he should have turned over to the assignee. Had he concealed any of such assets he would have violated section 154, Penal Code, and so been guilty of a high-grade misdemeanor. Viewing petitioner's plight, our Supreme Court stated in an opinion written by Chief Justice Beatty, 103 Cal. 354–355, 37 P. 231: "No person can be compelled, in any criminal case, to be a witness against himself. Const. art. 1, § 13. To bring a person within the immunity of this provision it is not necessary that the examination should be attempted in a criminal prosecution against the witness, or that such a prosecution should have been commenced and actually pending. It is sufficient if there is a law creating the offense under which the witness may be prosecuted. If there is such a law under which the witness may be indicted or otherwise prosecuted for a public offense arising out of the acts to which the examination relates, he cannot be compelled to answer in any collateral proceeding, unless the law absolutely secures him against any use in a criminal prosecution of the evidence he may give; and this can only be done by a provision that, if he submits to the examination, and answers the questions, he shall be exempt from any criminal prosecution for the offense to which the inquiry relates. All these propositions are decided by the supreme court of the United States, upon an exhaustive review of the authorities in the case of Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195 [35 L.Ed. 1110],—a case in every essential particular identical with this."

A like meaning is given to the protecting words of the Constitution in Ex parte Cohen, supra, 1894, 104 Cal. 524, 38 P. 364. The petitioner had been imprisoned until he would answer questions asked him during an examination concerning another person, held before a committing magistrate. We find this discussion in the opinion illuminating, 104 Cal. 527–528, 38 P. 365: "The provision that a person shall not be compelled 'in a criminal case' to be a witness 'against himself' is to be construed as protecting him from being compelled to give any evidence which in a criminal prosecution against himself might in any degree tend to establish the offense with which he may be charged. It is only when his evidence may tend to establish an offense for which he may be punished under the laws of the state that he is a witness 'against himself' in a criminal case. The 'criminal case' in which he is a witness need not be against himself, but his immunity from compulsion extends to all evidence which may be used in any criminal case against himself, under whatever circumstances such evidence may be sought * * *." The circumstance that the court thereafter determined that no answer to the questions asked of the petitioner could tend to incriminate him, because of statutory immunity, does not detract from the force of the words quoted.

In Ex parte Tahbel, 1920, 46 Cal.App. 755, 189 P. 804, the petitioner sought his fifteen year old son's release from detention in Juvenile Hall, where he was confined because he would not answer some questions which were pertinent to a petition that he be declared to be a ward of the Juvenile Court for having committed perjury. In support of its conclusion that the detention was illegal, the District Court of Appeal, Finlayson, P. J., writing the opinion, stated, 46 Cal.App. 758–759, 189 P. 806: "According to one of the oldest maxims of the common law, '*Nemo tenetur seipsum accusare*,' any person, whether a party or stranger to the litigation, either in a civil action or a criminal prosecution, may, if he sees fit, refuse to answer any question the answer to which, if true, will render him punishable for crime, or which, in any degree, may tend to establish a public offense with which he might be charged. Rapalje on Witnesses, § 261. This principle of the common law doubtless had its birth in the abhorrence with which confessions coerced by inquisitorial torture were regarded alike in England and America. 8 R.C.L., p. 78. Its soundness has seldom been questioned. And to-day it stands among the guaranties of personal liberty and security in all the Constitutions, both of England and America." We add, that there is nothing in the many trials reported from behind the iron curtain, with their inevitable confessions, that tempts us to whittle away at this principle established in our judicial system.

In re Lemon, 1936, 15 Cal.App.2d 82, 59 P.2d 213, and Ex parte Critchlow, 1938, 11 Cal.2d 751, 81 P.2d 966, do not cast much new light upon our problem, but they serve to indicate that the light of the earlier cases remains undimmed.

The predicament of three more persons who found themselves jailed because of their refusal to answer questions gave rise to three opinions in which it was held that the protection of section 13, article I, is not limited to cases where the declaration demanded would amount to an involuntary confession of the crime itself, but is so broad that one is not required to reveal any detail that might assist in convicting him of a crime. In Ex parte Berman, 1930, 105 Cal.App. 37, 44–45, 287 P. 125, 128, the court made a quite extensive quotation from an opinion of Chief Justice Marshall, given in the case of United States v. Burr (In re Willie), 25 Fed.Cas. page 38, of which it said: "That this concise yet comprehensive statement of the celebrated chief justice remains the law to-day is evident from the fact that almost every case throughout the United States, down to and including Mason v. United States, 244 U.S. 362, 37 S.Ct. 621, 61 L.Ed. 1198, has quoted it with approval." We limit our re-quotation to these words: " 'The counsel for the United States have also laid down this rule according to their understanding of it; but they appear to the court to have made it as much too narrow as the counsel for the witness have made it too broad. According to their statement a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to *furnish any one of them against himself*. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.' "

[6] That one cannot be required to speak if by so doing he might furnish a link in the chain by which a conviction might hang, is held also in Ex parte Crow, 1932, 126 Cal.App. 617, 14 P.2d 918, 919, and in Ex parte Sales, 1933, 134 Cal.App. 54, 59, 24 P.2d 916, 918. We add this quotation from In re Doyle, 1931, 257 N.Y. 244, 177 N.E. 489, 491, 87 A.L.R. 418, 421, where

Chief Judge Cardozo was speaking of the provision in the Constitution of New York that no person shall "be compelled in any criminal case to be a witness against himself": "The privilege may not be violated because in a particular case its restraints are inconvenient or because the supposed malefactor may be a subject of public execration or because the disclosure of his wrongdoing will promote the public weal.

"It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the state; and neither legislators nor judges are free to overleap it.

"The appellant is therefore privileged to refuse to answer questions that may tend to implicate him in a crime, unless by some act of amnesty or indemnity, or some valid resolution equivalent thereto, he has been relieved from the risk of prosecution for any felony or misdemeanor that his testimony may reveal. The immunity is not adequate if it does no more than assure him that the testimony coming from his lips will not be read in evidence against him upon a criminal prosecution. The clues thereby developed may still supply the links whereby a chain of guilt can be forged from the testimony of others. To force disclosure from unwilling lips, the immunity must be so broad that the risk of prosecution is ended altogether."

Turning now to the ordinance, we find it begins with this unequivocal statement: "There exists a world-wide revolutionary movement whose purpose it is, by any means deemed necessary, to establish and perpetuate a totalitarian communist dictatorship based upon force and power, rather than upon law, in all of the countries of the world, including the United States, even though it be against the consent of the majority of the people of such countries." Then follows in too many words to quote, not a definition, but a characterization of this world-wide revolutionary movement. It aims to put into effect the basic precepts of communism (the ordinance states) expounded by Karl Marx and a number of others, as they have been and are being interpreted and executed by the Soviet Union. It has supplanted constitutional governments with communist dictatorship, against the will of the people whose governments were overthrown. It achieves its goals by terrorism, sabotage and organized confusion. "In Los Angeles County," the ordinance continues, "there are active, disciplined communist organizations presently functioning for the primary purpose of advancing the objectives of the world communism movement * * * notwithstanding the refusal of the majority to accept such principles and doctrines through the free exercise of the ballot or by any other lawful or constitutional means." More of like tenor appears.

As a conclusion following the recital of these facts, the ordinance does not put the finger upon any individual or group of individuals and declare: "We have been talking about you, and this is what shall be done as a consequence," as the legislation which was condemned in Communist Party v. Peek, 1942, 20 Cal.2d 536, 127 P.2d 889, attempted to do. Instead, it defines "communist organization" as meaning "any organization which is organized, or which operates, primarily for the purpose of advancing the objectives of the world communism movement," and requires, under a possible penalty of a $500 fine and six months' imprisonment for disobedience, that "every person who resides in, is employed in, has a regular place of business in, or who regularly enters or travels through any part of the unincorporated territory of Los Angeles County, and who is a member of any communist organization, shall register by acknowledging under oath and filing with the Sheriff's Department of the County a registration statement containing the following (1) Name and any alias or aliases of the registrant * * * (4) The name of all communist organizations of which he is a member." This leaves these facts, at least, to be proven in any prosecution under the ordinance: (a) the existence of an organization, (b) its character as a "communist organization," (c) membership of the defendant in it, and (d) that the defendant resides, or whatever, in some unincorporated area in Los Angeles County.

Succinctly stated, but unmistakably clear, that which the ordinance requires, under penal sanctions, is that any person (residing or &c) who belongs to an organization that purposes to substitute the economic system known as communism for our present system of industrial ownership and control, and to overthrow our present form of government and replace it with a dictatorship, and which proposes to accomplish these purposes not by constitutional means but by terrorism and sabotage, must file an affidavit with the sheriff, giving his name and the name of the organization that holds these purposes. But—compliance with the ordinance would amount to a virtual confession that the registrant had violated the so-called Criminal Syndicalism Act (Stats. 1919, p. 281, Act 8428, Deering's Gen'l Laws). The act is a short one and we quote only a part: Section 1. "The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change." Section 2. "Any person who * * *

"4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism * * *. Is guilty of a felony". The constitutionality of this subdivision 4 of section 2 was upheld in People v. Steelik, 1921, 187 Cal. 361, 203 P. 78, and again in Whitney v. People of State of California, 1926, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095.

In view of the facts found in the ordinance (and we, with our judicial knowledge of current events, shall not undertake to contradict any of them), it is not at all fanciful that any member of a communist organization, as defined by the ordinance, may find himself under indictment for violating subdivision 4, section 2 of the Criminal Syndicalism Act. The one fact essential to the successful proof of his guilt may well be the fact of his membership in an organization whose illegal activities are known. In such event, the defendant's registration would serve to furnish an important link in the prosecution. Perhaps the activities of the defendant will be known, but the identity of the group with whom he has conspired will be the missing link. It may be that the facts establishing the venue will be those the prosecution needs. We can see an advantage to the prosecution in having the defendant's registration, but it is denied that advantage by the long established, constitutionally expressed, prohibition against compelling an individual to bear witness against himself. Because that would be the effect of the ordinance, it has no effect.

Several of the arguments put forward in defense of the ordinance against the attack upon it which we have been considering, merit mention here. We are sympathetic to the argument that, generally speaking, the constitutionality of an ordinance can be more fairly determined after the facts of the case have been developed at a trial, by which time the question becomes more concrete and less abstract than appears upon a demurrer. By way of pressing home the point, *amici curiae* rely upon the rule stated in Rebstock v. Superior Court, 1905, 146 Cal. 308, 313, 80 P. 65, 67: "* * * a witness is not exempted, under the constitutional provision * * * from testifying concerning any offense which is, as to him, barred by the statute of limitations", and suggest that the bar of the statute might remove the possibility of self incrimination from the defendants here. That suggestion would be worthy of consideration if the criminal prosecutions that the defendants possibly face were for acts committed some time ago. As we have seen, however, the ordinance requires only one presently a member of a communist organization to register, and so the felony that such membership is declared to be by the Criminal Syndicalism Act does not outlaw for three years (section 800, Penal Code). Under the situation as presented in these cases, where the danger of self incrimination appears on the mere reading of the ordinance, the constitutionality of the ordinance is fairly at issue, and must be determined, under the attack of a demurrer.

Nor is the ordinance a simple police power regulation requiring the identification of citizens. The requirement of section 482, Vehicle Code, that the driver of a vehicle involved in an accident shall give his name, address and the registration number of his vehicle, does not necessarily implicate the driver in the commission of a crime, for an accident is not a crime, per se. The constitutionality of this and similar statutes is approved in People v. Diller, 1914, 24 Cal. App. 799, 142 P. 797. The ordinance we are considering does not come into operation, however, until a violation of the Criminal Syndicalism Act has occurred, and only one who is violating that act is compelled to register and by registering furnish, quite likely, some of the clews needed to establish his guilt. No such statute as this is looked upon with favor in the Diller case.

As we have already discovered, it has repeatedly been held that unless complete immunity from prosecution as to the crime "confessed" is given, one cannot be compelled to be a witness against himself. The provision of section 7 of the ordinance to the effect that the registration statements shall not be available for public examination does not attempt to grant such immunity, nor does it have any such effect. We doubt seriously—we need not determine the matter—that any provision of a county ordinance could have the effect of limiting the receipt of what would otherwise be competent evidence in a criminal prosecution. We are sure that no county ordinance can validly provide that any act shall confer immunity from prosecution for committing an act declared to be a crime by the legislature. Such an ordinance would unquestionably be "in conflict with general laws", and so fall within the limitations of section 11, Article XI, State Constitution. But be that as it may, the ordinance under review cannot be interpreted as even attempting to grant immunity, nor as giving it.

A further argument along the same line is that inasmuch as the registration is compulsory, it would not be received in evidence against the registrant. This is true, of course, of confessions involuntarily given, but it is not necessarily true of such admissions against interest as the registration affidavits would be. Note the uncertain rule of the decisions with respect to the necessity of the voluntary character of admissions, not amounting to confessions, in order that they may be received in evidence: 8 Cal.Jur. 99–100; People v. Shannon, 1928, 203 Cal. 139, 143, 263 P. 522; People v. Nagle, 1944, 25 Cal.2d 216, 222–223, 153 P.2d 344; People v. Eggers, 1946, 30 Cal.2d 676, 689, 185 P.2d 1; People v. Trawick, 1947, 78 Cal.App.2d 604, 608, 178 P.2d 45; People v. Ramsey, 1948, 83 Cal. App.2d 707, 721, 189 P.2d 802. We have in mind also that the constitutional protection against unreasonable searches and seizures, contained in section 19 of Article I of the State Constitution, the philosophy of which is quite like that against self incrimination, see Feldman v. U. S., 1943, 322 U.S. 487, 489, 490, 64 S.Ct. 1082, 88 L.Ed. 1408, 1412, 1413, does not serve to keep any article found in an unlawful search from being used in evidence in the state courts. People v. Rochin, 1950, 101 Cal.App.2d 140, 165, 225 P.2d 1, 2, and cases cited, including People v. Gonzales, 1942, 20 Cal.2d 165, 169, 124 P.2d 44, 46. But we need not anticipate, or await, an authoritative ruling on the admissibility in evidence of a compulsory registration that could aid in the prosecution of the registrant. All we need note is that if the contention is sound, that statements made under compulsion thereby are robbed of their self incriminatory effect, then all the decisions, which have freed those who were in jail because they refused to give answers to questions that were deemed self incriminating, were wrongly decided. We must conclude that the contention, and not the long line of cases, is unsound.

[7] It is further contended that the rule against self incrimination is limited to criminal sanctions stemming from the same governmental entity and that the privilege of silence is not available when a threat of criminal proceedings stems from the laws of another governmental agency. If the word "sovereignty" is substituted for the

word "agency" some authoritative support for the contention may be found. See Feldman v. U. S., supra, 322 U.S. 487, 64 S.Ct. 1082, 88 L.Ed. 1408. Neither any authority, of which we are aware, nor any reason that has been brought or comes to our minds, justifies the conclusion that the County of Los Angeles is so independent of the State of California, that in spite of the protection afforded by the State Constitution a person may be required by a law of the county to make a declaration which may serve to convict him of a violation of a state law. If a different conclusion is to be reached when the violation is that of another agency, as, for example, an ordinance of a city in the county, let it be reached in a case involving such a violation. We are convinced that a county ordinance may not, constitutionally, require a person to state a fact which might incriminate him with respect to a state created felony

Some other contentions have been made on the subject we have been discussing, but they are either disposed of by that which we have already said or do not, in our opinion, merit discussion here. We do desire to refer to three cases which, although not controlling on our question of state law, do constitute respectable authority. The first of these, chronologically speaking, is Alexander v. U. S., 1950, 181 F.2d 480, where, by a four to three decision after a hearing in bank, the United States Court of Appeals of the Ninth Circuit reversed several judgments of contempt imposed because the prisoners had refused to give answers to questions before a federal grand jury which answers would have revealed their knowledge of or familiarity with the Los Angeles Communist party.

In Estes v. Potter, 1950, 183 F.2d 865, the United States Court of Appeals, Fifth Circuit, reversed a judgment of contempt arising out of the refusal of the appellant to answer questions first propounded to him at an examination being held by immigration authorities and which he was then ordered to answer by the Federal District Court. The questions asked of the appellant were if he knew whether or not certain aliens were or had been Communists. He declined to reply on the ground that his answer might incriminate him. This quotation from the opinion lends support to many statements we have made, 183 F.2d at page 867: "We cannot agree that the matter is so simple. The answers to these questions in themselves may not have even tended toward the incrimination of appellant, but they may have been links in a chain of circumstantial evidence strong enough to convict him of a number of crimes; or such answers might well provide the means whereby such evidence could be discovered. Appellant's claim of privilege rests upon a reasonable fear of prosecution under 18 U.S.C.A. § 2385, and the general prohibition against conspiracy to commit an offense against the United States, 18 U.S.C.A. § 371. The offenses defined in the foregoing statutes include at least the following: (1) Knowingly or wilfully advocating the overthrow of the government by force or violence; (2) Knowingly or wilfully abetting such advocacy or such overthrow; (3) Organizing a society, etc., which teaches, advocates, or encourages the overthrow of government by force or violence; (4) Helping or attempting to organize such a society; (5) Becoming a member of any such society knowing its purposes; (6) Affiliating with any such society knowing its purpose; and (7) Conspiracy to do any of the foregoing.

"If the answers to the questions might tend to show that the appellant was a member of or affiliated with the Communist party, his fear of criminal prosecution was justified."

A different result was reached by the United States Court of Appeals of the Tenth Circuit in the case of Rogers v. U. S. (Blau v. United States) 1950, 180 F.2d 103, and the conflict of this decision with the two we have just reviewed was given by the United States Supreme Court as one of the reasons it granted certiorari in the Blau case. Blau v. United States, 1950, 340 U.S. 159, 71 S.Ct. 223. The case follows the familiar pattern. Patricia Blau had been found guilty of contempt because, when called as a witness before a federal grand jury, and then before the federal judge, she refused to answer questions concerning her knowledge of the officers, etc. of the Communist Party of Colorado. The contempt judgment was reversed by the Federal Supreme Court, the reasons for the reversal being set forth in one paragraph 71 S.Ct. 224: "At the time petitioner was called before the grand jury, the Smith Act was on the statute books making it a crime among other things to advocate knowingly the desirability of overthrow of the Government by force or violence; to organize or help to organize any society or group which teaches, advocates or encourages such overthrow of the Government; or to be or become a member of such a group with knowledge of its purposes. These provisions made future prosecution of petitioner far more than 'a mere imaginary possibility * * *.' Mason v. United States, 244 U.S. 362, 366, 37 S.Ct. 621, 622, 61 L.Ed. 1198; she reasonably could fear that criminal charges might be brought against her if she admitted employment by the Communist Party or intimate knowledge of its workings. Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act. Prior decisions of this Court have clearly established that under such circumstances, the Constitution gives a witness the privilege of remaining silent. The attempt by the courts below to compel petitioner to testify runs counter to the Fifth Amendment as it has been interpreted from the beginning."

In view of the conclusion we have reached, no good would be served by an expression of any views we may have upon the other attacks made upon the ordinance.

For the reasons given, the judgments appealed from are affirmed.

SHAW, P. J., and STEPHENS, J., concur.

36 Cal.2d 845

BRUCKS v. HOME FEDERAL SAV. & LOAN ASS'N et al.

L. A. 21113.

Supreme Court of California, in Bank.
March 14, 1951.

As Modified on Denial of Rehearing
April 13, 1951.

Action by Kate W. Brucks against the Home Federal Savings & Loan Association, a corporation, and Adele W. Tapley, executrix of the estate of Jeannett W. Kinkade, and others, to enforce a trust and quiet title to personalty. The Superior Court, San Diego County, Louis C. Drapeau, J., rendered an adverse judgment and the plaintiff and defendant Adele W. Tapley, executrix, appealed. The Supreme Court, Spence, J., held that a valid trust in a savings account was created in favor of plaintiff, which was revoked by a subsequent letter executed by the decedent, which constituted a testamentary document, which was in turn revoked by a later will, revoking all prior testamentary dispositions.

Judgment reversed.

For prior opinion, see, 220 P.2d 611.

1. Trusts 🔑34(1)

The doctrine of "tentative trusts" created by deposits "in trust" for some person other than the depositor is accepted law in California.

See publication Words and Phrases, for other judicial constructions and definitions of "Tentative Trusts".

2. Trusts 🔑34(1)

A deposit by one person of his own money and in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor, but it is a "tentative trust" merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of passbook or notice to the beneficiary.

3. Trusts 🔑34(1)

In determining whether an absolute trust is created by a deposit by one person of his own money and in his own name, as trustee for another, the determinative consideration is the intent of the depositor, and this is a question of fact for the trier of facts.

4. Trusts 🔑41

Whether form of bank deposit by one person of his own money and in his own name as trustee for another, without other evidence creates a presumption in favor of trust relation or an inference only, a controverting demonstration may be made, either to show there was no initial intention to confer the claimed benefit or that, after opening of the account with the requisite trust intent, the sentiments of the depositor on the matter changed.

5. Appeal and error 🔑1008(1)

Whether opening of a bank account by decedent in trust for plaintiff, created a valid trust, was for the trial court and its finding, that upon opening of the bank account a valid trust was created, was not subject to attack.

6. Trusts 🔑42

Where depositor created a valid trust in a savings account in a savings and loan association for plaintiff, instrument by which depositor sought to change the terms of the trust, so that plaintiff became a trustee obligated to administer the fund for the benefit of a third person, was properly admitted as showing the sentiments of the depositor had changed, and as a declaration of disaffirmance of the original terms of the trust made during the lifetime of the depositor.

7. Trusts 🔑59(1)

A tentative trust of a savings deposit in a bank can be revoked by the depositor at any time during his lifetime, by a manifestation of his intention to revoke and no particular formalities are necessary to manifest such an intention.

8. Trusts 🔑59(4)

Where depositor created a valid trust in savings account in a savings and loan association for plaintiff, and by a subsequent letter, simply exercised her reserved right of revocation with respect to any original trust in plaintiff's favor, no further act would be required to effectuate the purport of the letter as a disaffirmance of the trust.

9. Wills 🔑130

Where depositor's letter, directing plaintiff if depositor should pass away to draw out all the money in a savings account in trust for plaintiff and give the remainder after payment of expenses to the son of depositor, was wholly written, dated and signed by the depositor, it met the requirements of an "holographic will".

See publication Words and Phrases, for other judicial constructions and definitions of "Holographic Will".

10. Trusts 🔑59(4)

Where depositor created a valid trust in savings account in a saving and loan association for plaintiff and subsequent letter directed plaintiff to draw out the money and after payment of expenses to give remainder to the son of depositor and the letter was written with the purpos of arranging the affairs of the depositor after her demise, record established that the disposition of the bank account was a part of the depositor's testamentary plan as carried into her letter.

11. Trusts 🔑59(4)

A mere residuary bequest, as distinguished from a specific bequest of a fund, will not effect a revocation of a tentative trust.

12. Wills 🔑179

Where by a later will depositor abandoned her entire former testamentary plan, as to both dispositive and administrative provisions, with respect to disposition of a fund in savings and loan association deposited in trust for plaintiff and by subsequent letter directed disposition of the fund after payment of the expenses to the son of depositor, the disposition in the letter could not stand in face of the later will's plain expression of depositor's intent to revoke all prior wills.

13. Wills 🔑179

Where letter written by depositor was testamentary in character with respect to modification of the trust savings account and was followed by a later formal will, repudiating all former testamentary bequests and the prior nomination of plaintiff to administer the depositor's effects, the later will was a revocation of all prior wills, including the letter, where refusal to give the later will effect would run counter to the depositor's plain manifestation of testamentary intent in disposition of her property. Home Owners' Loan Act of 1933, § 5(b), 12 U.S.C.A. § 1464(b); Banking Code, §§ 3392, 3393.

Glendon L. Tremaine and Franklin L. Knox, Jr., Los Angeles, for plaintiff and appellant.

McNulty & Squier and Ralph W. Squier, all of San Diego, for defendant and appellant.

SPENCE, Justice.

This action involves the determination of the ownership of certain funds on deposit[1] in the Home Federal Savings & Loan Association. The controversy is between plaintiff, claiming as the designated beneficiary on the account in question, and defendant Adele W. Tapley, claiming as executrix of the will of the deceased depositor. The savings and loan association was also named a defendant herein; it disclaimed any beneficial interest in the fund and deposited the money in court; and the action was dismissed as to it. Following submission of the cause, the trial court decreed that a valid trust had been created and that plaintiff was entitled to possession of the fund but only in trust for the benefit of the deceased depositor's son, who was not a party to this action. The two contesting claimants have appealed: plaintiff from that portion of the judgment declaring the beneficial interest of the depositor's son in the fund; and defendant Tapley from the judgment in its entirety.

As ground for reversal, both appealing parties urge that the trial court exceeded its jurisdiction in rendering judgment in favor of one not a party to the action, 49 C.J.S., Judgments, § 28, p. 68; Stockwell v. McAlvay, 10 Cal.2d 368, 376, 74 P.2d 504; Overell v. Overell, 18 Cal.App.2d 499, 502, 64 P.2d 483; Samter v. Klopstock Realty Co., 31 Cal.App.2d 532, 535, 64 P.2d 483; Hutchinson v. California Trust Co., 43 Cal.App.2d 571, 575, 111 P.2d 401, and accordingly, under this general rule, its adjudication of the beneficial interest of the depositor's son in the savings bank account as a trust fund cannot be sustained. Bachman v. Sepulveda, 39 Cal. 688, 689–690; O'Neil v. Ross, 98 Cal.App. 306, 323, 277 P. 123. Defendant Tapley further contends that the evidence does not support the finding that the bank account was subject of a valid trust at the time of decedent's death, and therefore the money on deposit therein properly belongs to the estate of the deceased depositor. The record shows her position to be well taken.

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[1] There was involved herein a savings share account in a federal savings and loan association rather than a deposit in a savings bank. The use in this opinion of the word "deposit" see Home Owners' Loan Act of 1933, § 5(b), 48 U.S.Stat. 128, 132, 12 U.S.C.A. § 1464(b) and the word "bank" (see Banking Code, §§ 3392–3393) follows the terminology found in the testimony and used by the parties in the briefs. The distinction between the two types of investment is wholly immaterial in the consideration of the points involved on this appeal.

On July 7, 1947, Jeannette W. Kinkade, the decedent, opened an account with the Home Federal Savings & Loan Association in San Diego. The account was entitled "Kinkade, Jeanette W., in trust for Kate W. Brucks." According to the bank's records, the initial deposit was $1,500; on October 6, 1947, there was an additional deposit of $2,242.47; thereafter and between October 27, 1947, and February 6, 1948, five small withdrawals were made; and on the death of Mrs. Kinkade, February 10, 1948, the balance in the account was $3,087.37. No change was made in the form of this account and no subsequent instructions relative to its disposition were given to the bank.

Kate W. Brucks, plaintiff herein was a second cousin of decedent, and they had been close friends for many years. Mr. Brucks, plaintiff's husband, testified that shortly after the account in question was opened in 1947, the deceased in his presence told his wife that she (deceased) had "put some money in the bank for" plaintiff.

The following letter was found in deceased's effects shortly after her death:

"Jan. 24, 1948.

"Dear Kate—

"I am sick and in case I should pass away, will you kindly look after my belongings?

"My bank book is in your name & mine.

"First thing draw out all the money & put it in your name.

"If there is anything left after all expenses are paid, will you kindly give the remainder to my son Frederic Kinkade. He needs it.

"I expect you to take money for all your expenses caused by this.

"Also if there is any pictures, bedding etc. he would want please let him have them.

"With much love
"Nettie

"My lace dress is in bottom of trunk also bank book.

"I wish to be buried in Kensico Cemetery by my husband and Dear Gladys.

Nettie

"Cedar Chest & small chair belong to me. They are for you."

The above letter was entirely written, dated, and signed by decedent. It was not mailed or delivered to the addressee.

On February 5, 1948, decedent executed a formal will, in which she revoked all prior wills, appointed Adele W. Tapley, her niece, as executrix, and gave to the latter the entire residue of her estate, to the intentional exclusion of her son Frederic.

Plaintiff Kate W. Brucks instituted this action to recover the balance of the bank deposit as a trust account for her benefit. In opposition to plaintiff's claim, defendant Tapley relied upon the instruments executed by decedent subsequently to the opening of the bank account as revoking any trust character that may have attached to the account, and maintained that the remaining balance thus became part of the assets of decedent's estate. In resolving the controversy, the trial court found that upon the opening of the bank account, a "valid trust" was created, wherein the deceased depositor "retained a life interest" and plaintiff was the beneficiary; that thereafter the trustor, having "reserved the right to change, alter, modify or revoke" the trust, did modify it by her letter of January 24, 1948, so that the beneficiary became Frederic Kinkade; that upon the death of the trustor, "legal title" to the funds on deposit vested in plaintiff, "as trustee" and in trust for Frederic Kinkade, the son of the deceased trustor; and that plaintiff was without right, title, claim or interest in or to said funds or any part thereof, except as trustee. The court further determined that the trust "has now terminated," and ordered plaintiff "as trustee * * * to pay over to Frederic Kinkade the residue of said trust," subject to the payment of a "reasonable fee for her services," taxes, if any, and all costs incurred in the administration of the trust and of this case.

The rights of plaintiff and defendant Tapley must be determined in relation to these principal points: (1) whether a trust in favor of plaintiff was created by decedent upon opening the bank account in question; and (2) if so, what effect decedent's subsequent acts may have had thereon.

[1-4] The doctrine of "tentative trusts" created by deposits "in trust" for some person other than the depositor appears to be accepted law in this state. Kuck v. Raftery, 117 Cal.App. 755, 757-759, 4 P.2d 552; Evinger v. MacDougall, 28 Cal.App.2d 175, 179, 82 P.2d 194; Estate of Alberts, 38 Cal.App.2d 42, 47-48, 100 P.2d 538; Hyman v. Tarplee, 64 Cal.App.2d 805, 812-813, 149 P.2d 453; Kosloskye v. Cis, 70 Cal.App.2d 174, 177-180, 160 P.2d 565; Katz v. Greeninger, 96 Cal.App.2d 245, 247-248, 215 P.2d 121. In adopting such doctrine, the California decisions have followed the rule formulated in the oft-quoted case of Matter of Totten, 179 N.Y. 112, 71 N.E. 748, at page 752, 70 L.R.A. 711: "A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." The determinative consideration is the matter of the intent of the depositor, and "this is a question of fact for the trier of the facts." Kosloskye v. Cis, supra, 70 Cal.App.2d 174, 180, 160 P.2d 568; see, also, Restatement of the Law of Trusts, § 58, p. 181; Bogert, The Law of Trusts and Trustees, vol. 1, § 47, p. 202. Whether the form of the deposit, without other evidence, creates a "presumption" in favor of the trust relation or an "inference only" in that regard, as "the later New York cases [have] held," a "controverting demonstration" may be made either to show there was "no initial intention" to confer the claimed benefit or that, after the opening of the account with the requisite trust intent, the "sentiments of the depositor" on the matter changed. Kosloskye v. Cis, supra, 70 Cal.App.2d at page 180, 160 P.2d at page 568.

[5] In the present case there is the above-mentioned testimony of plaintiff's husband corroborating the trust purport of the form of the bank account as originally worded in plaintiff's favor. Consistent with this evidence of decedent's intent, the trial court found that the opening of the account created a valid trust. While defendant Tapley, as a premise for rebutting the trust purpose of the bank account to plaintiff's benefit, urges that the circumstances of the conversation attested by plaintiff's husband would sustain a different interpretation, the conflict was for the trial court to resolve and its finding cannot be successfully attacked. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

[6-8] There now remains for consideration the hearing of decedent's subsequent acts upon the continued existence of the trust. First in chronology is the above-quoted letter of January 24, 1948, some six months after the savings bank account was opened. By that instrument decedent sought to change the terms of the original trust so that plaintiff, the former tentative beneficiary, became a trustee obligated to administer the fund for the benefit of a third person, decedent's son Frederic. Manifestly, such letter was a matter properly in evidence as showing the "sentiments of the depositor [had] changed" Kosloskye v. Cis, supra, 70 Cal.App.2d 174, 180, 160 P.2d 568, a "declaration of disaffirmance" of the original terms of the trust made "during the lifetime of the depositor" Matter of Totten, supra, 179 N.Y. 112, 71 N.E. 748, 752. Plaintiff cites these factors as indicating that decedent never intended that the letter should take effect: it was never delivered or mailed to plaintiff, the addressee; and no different instructions were given to the bank in consequence of the alteration of the trust provisions. However, "a tentative trust of a savings

deposit in a bank can be revoked by the depositor at any time during his lifetime, by a manifestation of his intention to revoke the trust. No particular formalities are necessary to manifest such an intention." (Restatement of the Law of Trusts, § 58, comment b, p. 183.) Consistent with this principle, decedent, by her subsequent letter, simply exercised her reserved right of revocation with respect to any original trust in plaintiff's favor, and no further act would be required to effectuate the purport of the letter as a disaffirmance of such trust. Cf. In re Bearinger's Estate, 336 Pa. 253, 9 A.2d 342, 343.

[9] The trial court further construed decedent's letter to effect a valid modification of the original trust and the disposition of the money in the bank account. By its express language, the letter directs plaintiff "in case [decedent] should pass away," to "draw out all the money," "put it in [plaintiff's] name," and "after all expenses are paid," "give the remainder to [decedent's] son Frederic Kinkade." Whether such writing, unless executed in conformity with testamentary formalities, should be given effect in the disposition of decedent's bank account under an extension of the "tentative trust" doctrine, cf. In re Bearinger's Estate, supra, 336 Pa. 253, 9 A.2d 342, 343, need not be here decided, for decedent's letter was wholly written, dated, and signed by her; and as such, it met the requirements of an holographic will. Estate of Button, 209 Cal. 325, 332–333, 287 P. 964.

[10] That decedent wrote the letter with the avowed purpose of arranging her affairs after her demise is not open to question. In addition to the above-cited references with regard to the handling of decedent's bank account upon her death, the letter makes the following provisions: (1) it assigns to plaintiff the duties of an executrix in directing her to "look after [decedent's] belongings" and to give to decedent's son Frederic certain articles of personal property as "he would want"; (2) it authorizes plaintiff, presumably from the bank account in question, to "take money for all [her] expenses" in the administration of decedent's estate; (3) it bequeathes a "Cedar Chest & small chair" to plaintiff; and (4) it requests that decedent "be buried" in a designated cemetery. Such instrument unmistakably shows that at the time of its execution, decedent was undertaking to make a complete transfer of her personal estate, to take effect after her death, and that she then intended plaintiff's benefit in her property to be limited to the mentioned specific bequest and to compensation for administrative services. The provision for the disposition of the bank account appears to be part of decedent's then testamentary plan as carried into her letter. Estate of Button, supra, 209 Cal. 325, 331, 287 P. 964.

[11–12] However, the force of decedent's letter of January 24, 1948, as a testamentary disposition of her property is nullified by her execution of a formal will some twelve days later, February 5, whereby she expressly revoked all prior wills. By the later instrument decedent makes a wholly different disposition of her property, intentionally excluding her son Frederic from any share in her property and bequeathing all of her estate, both real and personal, to defendant, her niece, naming her as executrix. It is true that decedent made no express mention of her bank account in the later will, and that it has been held that a mere residuary bequest, as distinguished from a specific bequest of the fund, In re Ryan's Will, Sur., 52 N.Y.S.2d 502, 508, will not effect a revocation of a tentative trust. In re Richardson's Estate, 134 Misc. 174, 235 N.Y.S. 747, 754; In re Pozzuto's Estate, 124 Pa.Super. 93, 188 A. 209, 210. But here by the later will, decedent apparently abandoned her entire former testamentary plan, as to both dispositive and administrative provisions, and the wholly inconsistent distribution and management of decedent's estate contemplated under the terms of the letter as a testamentary document cannot stand in the face of the later will's plain expression of decedent's intent to revoke thereby all prior wills.

The trial court, in holding that the letter constituted a valid modification of the trust and should be so enforced, was impressed by this consideration, as indicated by its memorandum opinion filed in this case and made a part of the record on appeal: Decedent's failure to make provision for her son in her later formally executed will was consistent with her belief that she had already provided for him by the terms of her letter, and no further references would be necessary in order to have him take the "trust" money. But it is not reasonable to assume from the content of the two testamentary writings—each in itself expressing a complete testamentary plan in the disposition and administration of decedent's property—that decedent, upon expressly revoking all prior wills, did not intend the will later in chronology to indicate her deliberate abandonment of the former testamentary plan.

[13] Nor does it appear that decedent may not have had the letter in disposition of the bank account in mind as a testamentary instrument when she executed the later will expressly revoking all prior wills. Cf. In re Pozzuto's Estate, supra, 124 Pa. Super. 93, 188 A. 209, 210. The letter of January 24, 1948, was wholly testamentary in character, wherein the modification of the trust bank account was but one of the several dispositive provisions regarding various items of decedent's property and designation was made of the person, plaintiff, to carry out decedent's testamentary wishes and "look after [her] belongings"; then followed the formal will of February 5, but twelve days later, wherein deliberate repudiation was made not only of the former testamentary bequests but likewise of the prior nomination of plaintiff to administer the decedent's effects. Under such circumstances, it is only reasonable to conclude that decedent must have realized the testamentary significance of the successively executed instruments in their respective forms, coincident with her express declaration revoking all prior wills. Moreover, there is no evidence of any independent declarations of trust on the part of decedent with respect to the bank account, suggestive of any intent on her part to separate such account from the general provision of her formal will of February 5 in effecting the distribution of her property, cf. In re Biggars, 39 Misc. 426, 80 N.Y.S. 214, 215; and as the bank records show, decedent, consistent with her continued retention of absolute control over the account, made a withdrawal therefrom on February 6, indicating her appreciation that the account was part of her property and that it was subject to her disposition. On February 10, 1948, the date of decedent's death, the will of February 5 stood as the latest expression of her testimony wishes and in revocation of all prior wills. To refuse to give this later will effect would run counter to decedent's plain manifestation of testamentary intent in the disposition of her property.

In the light of these observations, the conclusion is inescapable that the trial court erred in sustaining the operative effect of the letter of January 24 with relation to the bank account, in disregard of the express revocatory clause contained in the later formal will of February 5; and defendant Tapley properly maintains that she is entitled to possession of the funds on deposit in the disputed bank account as part of the assets of decedent's estate.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

36 Cal.2d 854

HUGHES v. OREB et al.

L. A. 21737.

Supreme Court of California.

March 13, 1951.

William J. B. Hughes sued Nick K. Oreb, the City of Los Angeles, and O. H. Ledbetter and H. J. Greenwood, police officers of such city, for false imprisonment. From a judgment of nonsuit as to defendant Oreb and judgments for defendants police officers in the Superior Court of Los Angeles County, William S. Baird, J., plaintiff appealed. The Supreme Court, Gibson, C. J., held that the evidence did not show, as a matter of law, that defendant officers had reasonable cause for arresting plaintiff.

Judgments for defendants police officers reversed, and judgment for defendant Oreb affirmed.

Prior opinion, Cal.App., 221 P.2d 327.

1. Appeal and error 🔑110

An order denying new trial is not appealable.

2. Trial 🔑139(1)

A nonsuit or directed verdict may not properly be granted against plaintiff, when there is evidence of sufficient substantiality to support judgment for him.

3. Appeal and error 🔑927(7)

In determining whether evidence was sufficiently substantial to support judgment for plaintiff, appealing from judgment of nonsuit or judgment on directed verdict for defendant, appellate court must view evidence most favorably to plaintiff, drawing every legitimate inference therefrom in his favor and disregarding all conflicts.

4. False imprisonment 🔑22

Ordinarily, plaintiff is deemed to have established prima facie case of false imprisonment by showing his arrest by defendant police officer without warrant, and burden then rests on defendant to plead and prove proper justification for arrest. Pen. Code, § 836.

5. False imprisonment 🔑31

In action for false imprisonment, evidence that plaintiff spent two silver dollars at bar in establishment owned by one from whose home about 100 such dollars were stolen during preceding night was insufficient to establish justification for his arrest by defendant police officers, without warrant, where dollars spent were not identified as part of those stolen and there was testimony that silver dollars were occasionally received in area and nothing to indicate that they appeared so infrequently in city wherein bar was located as to establish reasonable cause for believing that plaintiff stole the money. Pen. Code, §§ 17, 459–461, 836.

6. False imprisonment 🔑31

In action for false imprisonment, evidence of plaintiff's refusal to answer defendant police officers' questions and his resistance when taken into custody by them did not show reasonable grounds for them to believe him guilty of felony, as required to authorize his arrest without warrant, in view of evidence that officers were not in uniform, displayed no credentials, were not known by plaintiff to be officers, and did not inform plaintiff of cause of arrest and their authority to make it. Pen. Code, §§ 836, 841.

7. False imprisonment 🔑15(2)

While person participating in, or causing, procuring or instigating, unlawful arrest, of another, is liable to him for false imprisonment, such person must have taken active part in bringing about arrest, and he is not liable, if he merely gave information to police authorities in good faith.

8. False imprisonment 🔑15(2)

Conduct of person, from whose home about 100 silver dollars were stolen, in calling police to his bar and pointing out man spending silver dollars thereat on day after theft, was insufficient to render him liable for false imprisonment of such man, who was unlawfully arrested without warrant on charge of theft, in absence of showing that theft victim gave false information to officers or took active part in bringing about arrest. Pen. Code, §§ 17, 459–461, 836.

Entenza & Gramer and M. E. Storrie, all of Beverly Hills, for appellant.

Crider, Runkle & Tilson, Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., Roland Wilson and John F. Feldmeier, Deputy City Attys., all of Los Angeles, for respondents.

GIBSON, Chief Justice.

[1] Plaintiff brought this action for damages for false imprisonment against Oreb, owner and manager of an establishment in San Pedro known as the Hawaiian Gardens, and against Ledbetter and Greenwood, police officers of the City of Los Angeles. A motion for nonsuit was granted as to defendant Oreb at the close of plaintiff's case, and, after the introduction of evidence on behalf of officers Ledbetter and Greenwood, the court direct-

ed a verdict in their favor. Plaintiff has appealed from judgments for defendants and from an order denying a new trial. The appeal from the order denying a new trial must be dismissed because the order is not appealable. Reeves v. Reeves, 34 Cal.2d 355, 357, 209 P.2d 937.

On the morning of January 31, 1948, defendant Oreb discovered that about one hundred silver dollars had been taken from his home. He reported the theft, and defendant officers were assigned to investigate it. At about 12:30 o'clock of the morning of February 1, 1948, plaintiff went into the bar of the Hawaiian Gardens and ordered a drink, paying for it with a silver dollar. He later ordered a second drink and paid for it with another silver dollar.

Oreb called the police, and, while plaintiff was still at the bar, Ledbetter and Greenwood arrived at the Hawaiian Gardens in response to the call. Plaintiff saw them talking to Oreb, but they were not in uniform and plaintiff did not know they were officers. When he started to leave the place one of them asked him, "Where do you think you are going?" Plaintiff replied, "I am going home, if it is any of your business." The officer told plaintiff to step outside, saying, "You had better come with us. We have some questions to ask you." Plaintiff replied, "If you want to ask me anything you do it right in here." The officers took hold of plaintiff, and he tried to break away from them. They then announced for the first time that they were police officers, but they did not show him any credentials and there is no claim that they had a warrant.

The officers put handcuffs on plaintiff, took him to their car, which was parked nearby, and drove him to the police station at San Pedro. He was taken by defendant officers into a room, and when they started to search him he resisted, stating that no charges had been placed against him. Plaintiff testified that Greenwood proceeded to "manhandle" him, kicked him in the groin with his knee, and struck him in the stomach and in the face.

The officers did not tell plaintiff about the burglary, or why they wanted to question him, until after he had been searched. Plaintiff was refused permission to telephone his mother or his attorney, and when he complained to the officers about the manner in which he had been treated, Greenwood told him: "If we hear any more of that out of you, we have a place to take you, and we will give you such a working over that no one will ever know you."

After plaintiff had been in the room for about three-quarters of an hour he was taken to the booking desk and placed in a cell. He was not released until more than thirty hours later, but it was stipulated at the trial that the responsibility of defendant officers ceased when plaintiff was taken to the booking desk.

[2, 3] In seeking a reversal of the judgments plaintiff relies on the rule that a nonsuit or a directed verdict may not properly be granted against a plaintiff when there is evidence of sufficient substantiality to support a judgment for him. In determining whether the evidence is substantial an appellate court must view it most favorably to plaintiff, drawing every legitimate inference in his favor and disregarding all conflicts. Milana v. Credit Discount Co., 27 Cal.2d 335, 342–343, 163 P.2d 869, 165 A.L.R. 621; Gish v. Los Angeles Ry. Corp., 13 Cal.2d 570, 572–573, 90 P.2d 792. We shall first consider the propriety of the directed verdict in favor of the police officers.

The question whether the officers made an unlawful arrest, subjecting them to damages for false imprisonment, is governed by section 836 of the Penal Code, which provides, so far as pertinent here, that a peace officer may make an arrest without a warrant "3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it. * * *" Since it is undisputed that a felony was committed when silver dollars were stolen from Oreb's home (Pen. Code, §§ 17, 459–461), the liability of defendant officers depends upon whether they had reasonable cause for believing that plaintiff was the person guilty of taking the money.

[4] Ordinarily a plaintiff is deemed to have established a prima facie case for

false imprisonment if, as here, it appears that the defendant arrested him without a warrant. The burden then rests on defendant to plead and prove a proper justification. Kaufman v. Brown, 93 Cal.App.2d 508, 511–513, 209 P.2d 156; Collins v. Jones, 131 Cal.App. 747, 750, 22 P.2d 39; see 1 Cooley on Torts [4th ed. 1932] § 112, pp. 360–361; 22 Am.Jur. 422, 427; 35 C.J.S., False Imprisonment, §§ 55, 72, pp. 591, 625; cf. People v. Agnew, 16 Cal.2d 655, 661–664, 107 P.2d 601. Defendants contend, however, that the evidence established a justification for the arrest as a matter of law. They rely on the facts that silver dollars were stolen from Oreb's home, that plaintiff had spent silver dollars at the bar in the Hawaiian Gardens, and that plaintiff refused to answer their questions and resisted arrest.

[5] The mere fact that plaintiff spent two silver dollars did not justify the arrest. These dollars were not identified as part of those taken from Oreb's home, there is testimony that silver dollars were occasionally received in the area, and there is nothing to indicate that they appeared so infrequently in San Pedro that plaintiff's possession of some of them established reasonable cause for believing that he had stolen the money from Oreb's home.

[6] Plaintiff's refusal to answer questions and his resistance when he was taken into custody likewise do not show reasonable grounds for believing him guilty of the felony, because, according to his testimony, the officers were not in uniform, they displayed no credentials, and plaintiff did not know they were officers. Also the officers did not comply with section 841 of the Penal Code, which requires the person making an arrest to inform the person "to be arrested" of the cause of the arrest and the authority to make it. Plaintiff, of course, had no duty to answer questions of strangers who did not appear to be officers. Under such circumstances, resistance was to be expected and did not indicate guilt.

Accordingly, the record does not show as a matter of law that defendant officers had reasonable cause for making the arrest, and the directed verdict is erroneous since plaintiff established a prima facie case.

[7] Plaintiff contends that the nonsuit as to defendant Oreb was improper, and he relies on the rule that a person who participates in an unlawful arrest, or who causes or procures or instigates it, is liable for false imprisonment. Collins v. Owens, 77 Cal.App.2d 713, 719, 176 P.2d 372; Kaufman v. Brown, 93 Cal.App.2d 508, 515, 209 P.2d 156; see Miller v. Fano, 134 Cal. 103, 104, 66 P. 183; Frickstad v. Medcraft, 100 Cal.App. 188, 194, 279 P. 840; Prosser on Torts [1941], 72. The cases make it clear, however, that the defendant must have taken some active part in bringing about the unlawful arrest and that he is not liable if, acting in good faith, he merely gives information to the authorities. Gogue v. MacDonald, 35 Cal.2d 482, 218 P.2d 542; Miller v. Fano, supra, 134 Cal. 103, 66 P. 183; Squires v. Southern Pacific Co., 42 Cal.App. 459, 183 P. 695; cf. Walton v. Will, 66 Cal.App.2d 509, 514, 152 P.2d 639; see Prosser on Torts [1941], 72. It was pointed out in the Miller case that every person is entitled to give information to the proper officers and that it would be unjust to impose liability for an honest mistake in identification even where the identification may have beeen the principal cause of the wrongful arrest. 134 Cal. at pages 106–107, 66 P. 183. Particularly pertinent with regard to what constitutes instigating or participating in an unlawful arrest is the language of Gogue v. MacDonald that where "the defendant reports the facts to the magistrate, takes no active part in the arrest but leaves the matter to the public officials and no bad faith appears, he is not liable merely because the facts he has stated to the magistrate do not constitute a public offense." 35 Cal.2d at page 487, 218 P.2d at page 545.

[8] In the present case there is evidence that defendant Oreb called the police and pointed out plaintiff as the man who was spending silver dollars, but there is nothing to indicate that he gave any false information to the officers or that he took any active part in bringing about the arrest. It might be inferred that Oreb requested the officers to make an investiga-

tion, but it is clear from the cases discussed above that his conduct was not sufficient to render him liable for false imprisonment even though the subsequent arrest may have been unlawful. The nonsuit as to Oreb, therefore, was properly granted.

The judgment in favor of defendants Ledbetter and Greenwood is reversed, and the judgment in favor of defendant Oreb is affirmed. The appeal from the order denying a new trial is dismissed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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36 Cal.2d 807

HOGAN v. STATE BAR.

L. A. 21711.

Supreme Court of California, in Bank.

March 13, 1951.

Rehearing Denied April 10, 1951.

Proceeding by petitioner to review recommendation of the Board of Governors of the State Bar that petitioner be suspended from the practice of law for three months. The Supreme Court held that evidence sustained finding that petitioner violated his duties.

Order in accordance with opinion.

1. Attorney and client 🔑53(2)

In proceeding to review recommendation of Board of Governors of State Bar that attorney be suspended from practice of law for three months, evidence sustained finding that attorney violated his duties.

2. Libel and slander 🔑38(3)

Certain pleadings in court actions are considered to be privileged for purposes of relief from liability for libel. Civ.Code, § 47, subd. 2.

3. Libel and slander 🔑48(3)

A fair comment upon candidates for public office is not an actionable libel.

4. Constitutional law 🔑64

Disciplinary proceedings by Board of Governors of State Bar do not involve an unconstitutional delegation of legislative authority since proceedings are judicial in character, and functions of State Bar are advisory only, with final action in Supreme Court.

5. Attorney and client 🔑48

Notice of preliminary investigation of State Bar in disciplinary proceedings against attorney may be given orally or in writing.

6. Attorney and client 🔑48

Preliminary investigation in State Bar disciplinary proceedings is merely for the purpose of deciding whether formal charges should be brought.

7. Attorney and client 🔑52

That State Bar did not answer attorney's petition to review disciplinary proceeding against him is no ground for decision in attorney's favor by default.

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Frank I. Hogan, Huntington Park, in pro. per.

J. R. Vaughan, Los Angeles, and Jerold E. Weil, San Francisco, for respondent.

PER CURIAM.

This is a proceeding to review the recommendation of the Board of Governors of the State Bar that the petitioner be suspended from the practice of the law for a period of three months.

In a notice to show cause issued by the local administrative committee for the county of Los Angeles the petitioner was charged with violation of his oath and duties as an attorney. (Sections 6067, 6068 and 6106 of the State Bar Act.) The disciplinary proceeding was initiated because of the petitioner's statements in an "amended motion" for a new trial in a pending action and in a letter sent to the Los Angeles office of the State Bar. It was charged that on or about February 7, 1950, in the new trial proceedings he did not maintain the respect due to courts of justice and judicial officers, but engaged in offensive personality by referring in a disparaging way to the judge presiding in the case, charging him with being a petty judge, with acting as a prosecutor and attorney for the plaintiff in the case, and with being prejudiced against certain witnesses because of their religion. It was also charged that on or about March 14, 1950, in connection with the preliminary disciplinary hearing the petitioner sent to the State Bar a letter entitled "Open Letter To The Right Honorable Harry R. Simon, Recorder of Bell and Notary Public:", in which he engaged in a further disrespectful attack upon the same judge.

The petitioner filed an answer to the notice to show cause in which in the main he objected to the sufficiency of the charges. He later unsuccessfully moved to dismiss the charges upon the basis of his own affidavit explaining his conduct. The local administrative committee held hearings for three days, after which findings of fact, conclusions, and a recommendation were filed with the Board. The committee found that the charges made against the judge by the petitioner were false, and that the unrestrained and defamatory nature of the "open letter" was a reflection upon the court and a conscious and intentional effort by the petitioner to defame and malign the court and the judicial office of the judge. It was concluded that the petitioner indulged in offensive personality within the meaning of section 6068(f) and violated his oath and duties as an attorney within the meaning of section 6103. The committee also concluded that the petitioner's conduct amounted to moral turpitude and dishonesty within the meaning of section 6106. The recommendation was for suspension from practice for one year.

The Board of Governors adopted the committee's findings and conclusions except the conclusion relating to moral turpitude and dishonesty. The Board reduced the recommendation to suspension for three months.

[1] The petitioner's principal contention is that the evidence does not support the findings. An examination of the "amended motion" for new trial and of the "open letter" discloses that the findings and conclusions of the Board were justified. Extracts from the record on the amended motion will indicate its offensive nature: "* * * I want once and for all to raise the question of the jurisdiction of petty police judges raised up to the dignity of Municipal and Superior Judges: * * * How then can a petty police judge * * * assume jurisdiction in a case pending in the Municipal Court * * * These petty judges are not elected or appointed to the Municipal Court * * *. [H]ence I claim the sitting judge in this case had absolutely no jurisdiction * * * Nice question, eh, what. Oh, yes. * * * [T]he court was also of the opinion that [three of the witnesses] lied; * * * with some attorneys everybody that does not agree with them lie and with some *judges,* they like to act as *prosecutors* and *attorneys* for the plaintiff and very often confuse the witness to such an extent that he does not know whether he is going or coming * * * I happen to know [two of the witnesses] and I have always found them * * * truthful. They are religious men. They do not attend a synagogue; but they are good Christians. Of course, Christians do not go to synagogues * * *."

Short excerpts from the numerous disrespectful remarks in the thirteen page typewritten "open letter" will demonstrate the equally improper tenor of the language employed in that document:

"My dear Harry and State Bar:

"* * * I noted * * * that you have an LLD from the Metropolitan Business College. Well I was offered one also for $250.00 but I did not buy it * * *. I am [writing a legal work] and when I am through * * * it will enable you to learn and study some more law.

"* * * I am not a picolo player. I know to do what you have done in the musical line one must have a lot of wind and as our mutual friend said to me that that is your chief characteristic—wind. * * * I have found out one thing and that is that in order to get a fair trial before you, one must have a jury and a court reporter; both, especially if you do not happen to like the lawyer. * * * And you also remember in the Pitchfork case that you tried to prosecute my client; but this time I had a jury and you did not succeed * * *"

The petitioner contends that his reference to the judge as a "petty judge" was not meant to be disrespectful but was merely a reference to the inferior jurisdiction of a police court judge. Even so the other thinly-veiled inferences in the motion and in the letter remain without satisfactory explanation. There was no evidence presented at the disciplinary hearing to justify them. They stand as lapses in professional deportment and fully warranted the conclusion of the Board that petitioner violated his duty under section 6068(f) to abstain from offensive personality. Cf. In re Philbrook, 105 Cal. 471, 38 P. 511; Bar Association v. Philbrook, 35 Cal.App. 460, 170 P. 440. It is equally apparent that the petitioner has violated his duty under section 6068(b) to maintain the respect due to the courts of justice and judicial officers. Cf. In re Collins, 147 Cal. 8, 18–19, 81 P. 220; In re Philbrook, supra, 105 Cal. 471, 38 P. 511; Bar Association v. Philbrook, supra, 35 Cal. App. 460, 170 P. 440; In re Graves, 64 Cal.App. 176, 221 P. 411.

[2, 3] The petitioner seeks to justify his remarks on the ground that they were privileged. He asserts that the statements in the "amended motion" for a new trial were privileged because contained in a pleading. He also argues that his statements in the "open letter" could be considered within the privilege of fair comment concerning a candidate for public office inasmuch as the judge to whom the remarks were directed was seeking reelection. It is true that certain pleadings are considered to be privileged for purposes of relief from liability for libel. Section 47–2, Civil Code; Gosewisch v. Doran, 161 Cal. 511, 119 P. 656. It is also true that a fair comment upon candidates for public office is not an actionable libel. Snively v. Record Publishing Co., 185 Cal. 565, 198 P. 1; Taylor v. Lewis, 132 Cal. App. 381, 22 P.2d 569. The merits of any such defenses in an action for libel are not here involved. This proceeding arises out of charges that the petitioner violated his duties as an attorney. As such he must answer for his disrespectful demeanor toward the courts and for engaging in offensive personality regardless of whether or not his conduct be considered libelous.

[4] The petitioner says that "this whole proceeding is contrary to law" because it is an unconstitutional delegation of legislative authority. Disbarment and disciplinary proceedings are, of course, judicial and not legislative in character. The functions of the State Bar are advisory only. Final action is with this court. The contention is without merit.

[5, 6] The petitioner asserts that proper notice of the preliminary investigation as required by Rule 22 of the Rules of Procedure of the State Bar was not given him and that the disciplinary proceedings are therefore invalid. Rule 22 does not require formal notice. It may be given orally or in writing. That the petitioner had actual knowledge of the preliminary investigation is established by the fact that he sent the local committee the "open letter." But in any event the preliminary investigation is merely for the purpose of deciding whether formal charges should be brought. Since the petitioner appeared and answered the formal charges on the merits, he cannot now complain that he was denied an opportunity to show that the charges were groundless.

[7] The petitioner has filed a "motion to enter default." He apparently entertains the erroneous view that the failure of the State Bar to answer his petition to review the disciplinary proceedings is a ground for a decision in his favor by default.

The Board of Governors' recommendation of a three months' suspension appears to be reasonable under the circumstances.

It is therefore ordered that the petitioner be suspended from the practice of the law in this state for the period of three months commencing thirty days after the filing of this opinion.

GIBSON, C. J., did not participate.

Rehearing denied; GIBSON, C. J., not participating.

36 Cal.2d 812

SANGUINETTI v. MOORE DRY DOCK CO.

S. F. 18232.

Supreme Court of California, in Bank.
March 13, 1951.

Rehearing Denied April 12, 1951.

Action under the Jones Act by Louis L. Sanguinetti against Moore Dry Dock Company, also known as Moore Drydock Company, a corporation, for injuries sustained by plaintiff while in the employ of defendant. The Superior Court in and for the City and County of San Francisco, Lile T. Jacks, J., entered judgment for plaintiff and the defendant appealed. The Supreme Court, Schauer, J., held that the operator in charge of a tug was a master entitled to sue under the Jones Act and that moving to increase in the presence of the jury at the conclusion of plaintiff's case in chief for leave to amend complaint so as to increase the amount sued for was prejudicial error.

Judgment reversed and caused remanded for a new trial.

Gibson, C. J., Traynor and Carter, JJ., dissented.

For prior opinion see 220 P.2d 398.

1. Workmen's compensation 🔑262, 2089

Operator in charge of a tug who at the time he was injured was actively engaged as master in navigating the tug and was primarily on board to aid in navigation was a "master" excluded from the coverage of the Workmen's Compensation Act and was entitled to maintain an action under the Jones Act for injuries. Jones Act, 46 U.S.C.A. § 688; Longshoremen's and Harbor Workers' Compensation Act, §§ 1, 2, 3, 5, 33 U.S.C.A. §§ 901, 902, 903, 905.

See publication Words and Phrases, for other judicial constructions and definitions of "Master".

2. Damages 🔑210(2)

Jury may be instructed as to the maximum verdict which may be returned.

3. Trial 🔑106

The making of a motion in the presence of the jury after production of evidence, to increase the amount of damages asked, and to bring to the knowledge of the jury, the fact that the court after hearing plaintiff's evidence permitted the complaint to be amended by increasing the prayer for damages, is improper.

4. Damages 🔑208(1)

The amount of damages is ordinarily a question of fact for the jury.

5. Seamen 🔑29(4)

In action under the Jones Act, if plaintiff had shown injuries for which amount claimed in complaint would constitute clear compensation, he would not necessarily be entitled to recover such amount, if his own negligence contributed proximately and in any substantial degree to such injuries, and it would be the duty of the jury, to compare the negligence of the parties, and award plaintiff only that proportion of the amount claimed which defendant's negligence bears to the entire negligence attributable to both parties. Jones Act, 46 U.S.C.A. § 688.

6. Negligence 🔑136(14, 25)

The issues of negligence and proximate cause are essentially questions of fact.

7. Negligence 🔑136(31)

Question of comparative negligence is essentially one of fact.

8. Appeal and error 🔑1041(2)

In action under the Jones Act, act of counsel for plaintiff in moving in presence of jury at conclusion of plaintiff's case in chief for leave to amend the complaint so as to increase the amount sued for was prejudicial error, where jury returned the full amount demanded, substantial evidence supported position of defendant that plaintiff's injuries were proximately caused by his own negligence, and that if the negligence of defendant proximately contributed to the injuries the damages assessed should be reduced by the jury under the comparative negligence doctrine. Jones Act, 46 U.S.C.A. § 688.

9. Appeal and error 🔑978(2)

While conclusion of trial court on a motion for new trial with respect to conduct of counsel of plaintiff in moving to amend complaint in presence of jury is entitled to much consideration, its decision thereon is not conclusive on appeal.

Williamson & Wallace, Brobeck, Phleger & Harrison, Wallace, Garrison, Norton & Ray and Moses Lasky, all of San Francisco, for appellant.

Dion R. Holm, City Atty., Edmond P. Bergerot and George E. Baglin, Deputy City Attys., all of San Francisco, Jennings & Belcher, Betts, Ely & Loomis, all of Los Angeles, as amicus curiæ on behalf of appellant.

Hoberg & Finger, Henry G. Sanford and John H. Finger, all of San Francisco, for respondent.

SCHAUER, Justice.

Defendant appeals from a judgment rendered against it in plaintiff's action, brought under the Jones Act (46 U.S.C.A. § 688)[1], to recover for injuries suffered by him while employed as the operator of defendant's tugboat, the "Moore No. 2." We conclude that by reason of the misconduct of counsel in moving in the presence of the jury, at the close of plaintiff's evidence, to amend the complaint by increasing the amount prayed for as damages, which motion was subsequently granted by the trial court, and the fact thereof brought to the attention of the jury, the judgment must be reversed.

The tugboat, 45′ 10″ in length and 12′ 9″ wide, was used to tow other craft, to place barges alongside hulls under repair at defendant's shipyards in the Oakland Estuary, and to go where needed around San Francisco Bay. When the tug was not in use, plaintiff did rigging work in the yard. He testified that his 40-hour work week was divided into approximately 24 hours as master of the tugboat and 16 hours as rigger; his hourly rate of pay was greater as tugboat operator than as rigger. His orders came from the rigging department. Plaintiff sometimes handled the tug alone and at other times was assisted by a deckhand.

On May 2, 1947, plaintiff, pursuant to orders, took the tugboat from defendant's Oakland yard to Pier 18 in San Francisco, picked up a 66′ derrick barge loaded with scrap steel, and towed the barge back to the Oakland yard where the steel was unloaded. The barge was then to be docked at a pier a short distance away. Plaintiff testified that while the tug was in motion during the docking operations, it became necessary, because of a faulty clutch on the tug, for him to jump back and forth from the tug to the barge. In so doing he lost his balance and his left leg was pinned between the tug and the barge as they swung together, and was badly crushed.

Defendant's first contention on appeal is that plaintiff was not a seaman entitled to sue under the Jones Act, but was rather a harbor worker whose exclusive remedy is under the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, ch. 509, 33 U.S.C.A. §§ 901, 905). That Act provides in section 902, however, that "(3) The term 'employee' does not include a master or member of a crew of any vessel * * *," and in section 903 that "* * * No compensation shall be payable in respect of the disability or death of—(1) A master or member of a crew of any vessel * * *."

[1] Defendant's counsel in his opening statement declared that plaintiff "was the operator in charge of the tug, and he was in law what would be called a 'master', although in connection with tugs, it is normally called an operator * * *." At the time plaintiff was injured he was actively engaged as master in navigating the tug and was "naturally and primarily on board to aid in her navigation" (South Chicago Coal & Dock Co. v. Bassett (1939), 309 U.S. 251, 260, 60 S.Ct. 544, 84 L.Ed. 732). It thus appears that, as plaintiff asserts, under the holding of the case just cited and of Warner v. Goltra (1934), 293 U.S. 155, 159, 55 S.Ct. 46, 79 L.Ed. 254, and Norton v. Warner Co. (1944), 321 U.S. 565, 571–572, 64 S.Ct. 747, 88 L.Ed. 931, he is as master excluded from the coverage

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[1] "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right of remedy in cases of personal injury to railway employees shall apply * * *"

of the Workers' Compensation Act, and is entitled to maintain this action. Moore Dry Dock Co. v. Pillsbury (1938), 9 Cir., 100 F.2d 245, relied upon by defendant, concerned a deckhand who was drowned while engaged in repairing a tugboat while she was tied up at the dock, and is not decisive here.

Defendant next contends that plaintiff's counsel committed misconduct in moving, in the presence of the jury, to amend the prayer of the complaint to ask $75,000 instead of $50,000 in damages, and that such misconduct when followed by the action of the court, after argument without the jury's presence, in granting the motion, resulted in such prejudice to defendant as to require reversal of the judgment.

The record discloses the following proceedings in the jury's presence at the close of plaintiff's case:

"Mr. Hoberg [Counsel for Plaintiff]: * * * Plaintiff will rest but asks leave to amend the complaint to increase the amount in the prayer from $50,000 to $75,000 incurred and to be incurred on the evidence that has been submitted here before the Court and jury.

"Mr. Ray [Counsel for Defendant]: I desire to argue that matter in chambers and reserve the right at this time to move for a mis-trial upon the grounds of plaintiff's misconduct in connection with the motion.

"The Court: Well, I will hear that matter out of the presence of the jury."

The jurors were then dismissed, and the following proceedings had:

"The Court: Now, then, in regard to this motion to amend the complaint, have you any authority there, or do you want to let it go over until tomorrow?

"Mr. Hoberg: There is no question about this, your Honor. I have done it a hundred times.

"The Court: It is done every day here, but I don't know whether in raising the amount—whether that is a matter that should have gone in outside of the presence of the jury."

After argument the court granted plaintiff's motion, defendant thereupon renewed his motion for a mistrial on the ground of misconduct of plaintiff's counsel in presenting the motion in the jury's presence, and the court denied defendant's motion. Defendant then presented its evidence, and the case went to the jury with an instruction, among others, that "The damages must be reasonable and cannot be in excess of the amount alleged in the complaint, namely $75,000." The jury retired from the courtroom, and thirty-five minutes later returned with a verdict for plaintiff in the sum of $75,000.

[2] No California decision directly in point has been cited or discovered by our research. It is, of course, the rule in this State that the jury may be instructed as to the maximum verdict which may be returned, as was done here. (Lahti v. McMenamin (1928), 204 Cal. 415, 421, 268 P. 644; see also McNulty v. Southern Pacific Co. (1950), 96 Cal.App.2d 841, 216 P.2d 534.) In Buswell v. City & County of San Francisco (1948), 89 Cal.App.2d 123, 133, 200 P.2d 115, in discussing defendant's point that a permitted amendment to increase the prayer had not been "formally made to the complaint," the court mentions that "At the end of the trial and in the *absence of the jury,* plaintiffs moved to amend the complaint to conform to the proof by increasing the prayer * * * Defendant vigorously objected. The court granted the motion." (Italics added.) The point before us in the instant case was thus not involved in Buswell. In Duffey v. General Petroleum Corp. (1949), 93 Cal.App.2d 757, 758–759, 209 P.2d 986, it is stated that "At the *beginning of the trial,* on October 19, 1948, plaintiffs' counsel moved to amend the complaint by increasing the amount of the alleged damage to $4,000, and the motion was granted. Defendant interposed an objection to the amendment, but did not ask for a continuance of the trial by reason thereof. The jury returned a verdict for $4,000." (Italics added.) No discussion of the point here at issue appears in the opinion.

In several New York cases the impropriety of moving, in the jury's presence, for permission to increase the amount sought in the prayer of the complaint is discussed and the practice condemned. Thus, in Kenney in South Shore Natural Gas & Fuel Co. (1908), 126 App.Div. 236, 110 N.Y.S. 503, 504–505, a personal injury action, "After the selection of the jury, and *before any evidence had been taken,* plaintiff moved to amend her complaint by changing the amount asked in her prayer for relief from $10,000 to $25,000. Defendant's counsel duly objected, and the court reserved its decision thereon. The evidence on both sides had been practically completed before the court passed upon the motion, and allowed the amendment asked for." The verdict was for $20,000. On appeal the judgment was reversed, with the following observations by the court: "It seems that the court on the trial of an action may, in the proper exercise of its discretion, permit plaintiff to amend his complaint by increasing the amount of damages demanded. [Citations.] * * * [But] we do not think such an amendment can properly be permitted * * * [without] explaining why application for the privilege had not previously been made * * * [and] some reason showing the propriety of the amendment * * *.

"* * * the record now before us * * * discloses no reason for granting the motion, unless the action of the court thereon was influenced by the evidence produced on the trial as to the extent and nature of plaintiff's injuries. * * * [nor] is there * * * in the statement of the court on granting the motion, a suggestion of a reason why such an amendment was asked for at that time, nor why it was then granted * * *. As the motion was *made in the presence of the jury,* and the court *held its disposition thereof until after the evidence was concluded,* it is at least probable that the jury may have been to some extent influenced in arriving at the unusually large verdict awarded by the, perhaps unwarranted, assumption that the court, after hearing the evidence, concluded that plaintiff had shown herself entitled to larger damages than she had at first demanded in her complaint, and that the court's favorable action on the motion was due to that fact." (Italics added.)

In Sandresky v. Erie R. Co. (1915), 91 Misc. 67, 153 N.Y.S. 612, 613, "At the opening of the trial, without an affidavit of the plaintiff, the latter was permitted to amend his complaint, increasing the demand for damages * * *" for personal injuries. After pointing out that the plaintiff had failed to explain why he had delayed until trial his motion to amend, and that the rule called for denial of the motion under such circumstances, the court concluded, "We think the present case is within the rule, and that it was error to permit the plaintiff to amend the complaint *in the presence of the jury,* and that because of this error the judgment should be reversed, with costs, unless the plaintiff is willing to stipulate that the damages shall be reduced to come within the cause of action originally pleaded." (Italics added.)

In Walker v. Bradt (1929), 225 App.Div. 415, 233 N.Y.S. 388, 391, the following appears: "Appellant's contention that the court erred in permitting plaintiff during the trial to increase the demand in her complaint from $3,000 to $6,000 is without merit. We are satisfied that this was *not done in the hearing of the jury,* and the amount of the verdict was less than $3,000." (Italics added.)

In Pfeil v. Klein (1936), 247 App.Div. 510, 286 N.Y.S. 721, 722, a personal injury action, the court said: "Plaintiff gave no intimation of any claim of damage, beyond $3,000, until the case was fully tried and the jury had been charged, and then asked to amend the complaint so as to demand $20,000 damages. This motion was denied, and then the court granted a motion to conform the pleadings to the proof. The verdict was for $8,000.

"The effect of the granting of the motion to conform the pleadings to the proof was to conform the pleading to whatever verdict the jury might find, and this, occurring, as it did, *in the presence of the jury,* carried the implication that the court thought that the proof warranted a verdict larger than $3,000. This caused prejudice to defendants, which requires a reversal. [Citing the Sandresky and Kenney cases, supra.]

"Had the verdict been $3,000 or less, no harm would have been done. Blackwell v. Finlay [1922], 233 N.Y. 361, 364, 135 N.E. 600; Walker v. Bradt [supra] * * *." (Italics added.)

In Blackwell v. Finlay, cited in Pfeil v. Klein, supra, "Plaintiff, an attorney * *, brought suit to recover the reasonable value of services rendered by him to defendant * * *. The jury found for the plaintiff * * * and rendered a verdict in his favor for $10,000 * * *, which was the amount demanded in the complaint." In affirming the judgment the court commented (at page 364 of 233 N.Y. at page 601 of 135 N.E.): "At the close of the evidence the plaintiff was permitted to amend his complaint by alleging that the value of his services was $17,000 and demanding judgment for that amount. If the verdict had been for more than the amount originally demanded, it might have been urged that this was an abuse of discretion and that the trial judge was without power to permit the amendment. We agree, however, * * * that defendant was not prejudiced. He was not contesting the value of the services as originally alleged in the complaint."

And in Sohman v. Metropolitan St. Ry. Co. (1907), 56 Misc. 342, 106 N.Y.S. 1033, in denying defendant's motion to set aside a verdict on the ground of surprise, the court states, "The amendment of the complaint by increasing the amount of damages claimed was granted at the close of the case after all the evidence was before the court. The argument was made in the absence of the jury, which had left the courtroom by direction of the presiding justice, and in accordance with his instructions no mention was made of the granting of such motion by counsel in summing up to the jury."

In the Missouri case of Prichard v. Dubinsky (1935), 338 Mo. 360, 89 S.W.2d 530, 531, in rejecting defendant's contention that "the court should not have permitted plaintiff to amend the petition at the close of the evidence by increasing the $10,000 prayed for as damages to $20,000," it is pointed out that "The amendment was not made in the presence of the jury." (See also Hinchliffe v. Wenig Teaming Co. (1916), 274 Ill. 417, 113 N.E. 707, 708.)

[3-4] Regardless of the lack of California authority on the precise point at issue, we are convinced that any practice which would include the making of a motion, in the presence of the jury, after production of evidence, to increase the amount of damages asked, and which would bring to the knowledge of the jury the fact that the court after hearing plaintiff's evidence permitted the complaint to be amended by increasing the prayer for damages, should be unhesitatingly condemned and stricken down. As commented in Starr v. United States (1894), 153 U.S. 614, 626, 14 S.Ct. 919, 38 L.Ed. 841, quoted in Bollenbach v. United States (1946), 326 U.S. 607, 612, 66 S.Ct. 402, 90 L.Ed. 350, "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." (See also Vaughan v. Magee (1914, 3 Cir.), 218 F. 630, 631.) It is, of course, elementary that the amount of damages is ordinarily a question of fact to be determined by the jury. (See 8 Cal.Jur. 877, sec. 119, and cases there cited.)

Plaintiff urges that in any event defendant could not have been prejudiced by what occurred, inasmuch as the court also instructed the jury generally that they were the sole judges of the evidence, they were not to be influenced on factual issues by any action of the court, that they were the sole judges of any damages to be awarded, and that any such damages must be reasonable.[2]

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[2] Such instructions include the following: "You will distinctly understand that in this charge the Court is in no manner or form expressing, or desires to express, any opinion on the weight of the evidence, or any part thereof; nor does the Court express any opinion as to the truth or falsity of the testimony of any witness; nor does the Court in any manner or form express its opinion that any alleged fact in this case is or is not proven. With questions of fact, the weight of evidence, the credit that you should give to any witness sworn in the case, the Court

Plaintiff also points out that defendant makes no contention that the jury's verdict is disproportionate to the injuries sustained by plaintiff. But regardless of the possible effect (or lack of effect) of this fact in a case based on California law, it cannot be decisive here where issue was joined not only on the *amount* of injuries sustained but also (under the Jones Act) on the *proportionate responsibility* (comparative negligence) of the parties, and where, upon the state of the evidence, a large measure of discretion rests with the jury.

[5-7] Defendant specifically resisted plaintiff's claim of damages, on the ground that plaintiff's injuries were proximately caused by his own negligence rather than that of defendant, and on the further ground that if any negligence of defendant were found to have proximately contributed to such injuries, then the damages to be assessed should be reduced by the jury under the comparative negligence doctrine which applies under the Jones Act. (See The J. H. Hillman, 3 Cir. (1939), 108 F.2d 231; Stewart v. United States, D.C. (1928), 25 F.2d 869.) Substantial evidence was introduced by defendant in support of its position. Assuming that plaintiff had shown injuries for which $75,000 would constitute fair compensation he is, nevertheless, not entitled to recover $75,000 from defendant if plaintiff's own negligence contributed proximately and in any substantial degree to those injuries. In such event it would be the duty of the jury to compare the negligence of plaintiff with that of defendant and to award plaintiff only that proportion of $75,000 which defendant's negligence bears to "the entire negligence attributable to both the plaintiff and the defendant." (Haskins v. Southern Pac. Co. (1934), 3 Cal.App.2d 177, 191, 39 P.2d 895.) This is not, therefore, a case in which the error can be said to be nonprejudicial because the issues were resolved on undisputed or overwhelming evidence. (See Blanton v. Curry (1942), 20 Cal.2d 793, 813, 129 P.2d 1; Anderson v. Hagen (1937), 19 Cal.App.2d 714, 726, 66 P.2d 168; Wilkerson v. City of El Monte (1936), 17 Cal.App.2d 615, 623, 62 P.2d 790 (Hrg.Den.).) As often emphasized by this court (see e.g., Anthony v. Hobbie (1945), 25 Cal.2d 814, 817-818, 155 P.2d 826). "The issues of negligence and proximate cause are essentially questions of fact." Likewise is the question of comparative negligence essentially one of fact, and because that question is ordinarily resolved by the jury

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has nothing to do. These are matters entirely within your province, and which you, as jurors, under your oaths, must determine for yourselves. * * *

"If the judge of this Court has at any time during this trial used any language, or has seemed to you to indicate the opinion of the judge as to any question of fact, or as to the credibility of any witness, you must not be influenced thereby, but must determine yourselves all questions of fact without regard to the opinion of anyone else.

"The Court charges you that you are not to use in the consideration or determination of any facts in the case any reference to or comment on the evidence which may have been made by the Court during the course of the trial, in connection with the admission of testimony or otherwise. The determination of the facts of the case is solely within your province, and you are not to be assisted or influenced in any way by anything which the Court may say or do in that behalf. * * *

"It is for you alone to judge of the credibility of the witnesses, the weight to be given the evidence offered, and its effects, and its conclusiveness, to establish any fact for which it has been offered. * * *

"* * * I, of course, do not know whether you will need instructions on the measure of damages, and the fact that they have been given to you must not be considered as intimating any opinion of my own on the issue of liability or as to which party is entitled to your verdict. * * *

"You are instructed that the law prescribes no definite measure of damages, but the law leaves such damages to be fixed by you as your discretion dictates and as, under all the circumstances, may be just and proper. It is not necessary, therefore, that any witness should have expressed an opinion as to the amount of such damages, if any, sustained by plaintiff, but it is for you, the ladies and gentlemen of the jury, to make such estimate of the damages, if any, from all of the facts and circumstances revealed by the evidence, and by considering them in connection with your own knowledge and experience in the affairs in life."

only by awarding a lump sum to the plaintiff, which sum must constitute reasonable compensation for his injuries less such proportion of the reasonable compensation as may be attributable to his own fault, the likelihood of prejudice from an error such as that which we have here is intensified.

[8] Under the circumstances we find no reasonable basis for holding that defendant was not prejudiced by the jury's knowledge that the court had permitted plaintiff to ask for $75,000, rather than $50,000, "incurred and to be incurred on the evidence that has been submitted here before the Court and jury," especially when consideration is given to the further fact that, as defendant points out, the "jurors retired, elected a foreman, reached a verdict, filled in the form of verdict, had it signed by the foreman, notified the bailiff, the bailiff notified the court, the court notified counsel, and the jury returned to the courtroom, all in 35 minutes."

The situation here, in legal effect, is basically comparable to that in Oettinger v. Stewart (1944), 24 Cal.2d 133, 140, 148 P.2d 19, 156 A.L.R. 1221, which prompted the court to say, "In cases where it clearly appears that the jury did not rely upon the erroneous instructions, the judgment may be affirmed on the ground that the error is not prejudicial. This, however, is not such a case. Neither the evidence of contributory negligence nor of negligence, although sufficient as a matter of law, can be said to be convincing, and we should not speculate upon the basis of the verdict." To the same effect see also Pipoly v. Benson (1942), 20 Cal.2d 366, 375, 125 P.2d 482, 147 A.L.R. 515; People v. Dail (1943), 22 Cal.2d 642, 140 P.2d 828; Intagliata v. Shipowners & Merchants Towboat Co. (1945), 26 Cal.2d 365, 382, 159 P.2d 1; Clement v. State Reclamation Board (1950), 35 Cal.2d 628, 220 P.2d 897. We think that the implications of prejudice are at least as strong in a case such as this as in any of the cases cited.

In Berguin v. Pacific Elec. Ry. Co. (1928), 203 Cal. 116, 118–121, 263 P. 220, it was held that comments by the trial court in the jury's presence which indicated his doubt of the necessity of helping the injured plaintiff to the witness chair, were prejudicial and constituted reversible error. The opinion comments (203 Cal. at pages 120–121, 263 P. at pages 222–223), that "It needs no citation to convince any unbiased observer that a jury has both ears and eyes open for any little word or act of the trial judge from which they may gather enough to read his mind and get his opinion of the merits of the issues under review. * * * The above error must, therefore, be held sufficient in and of itself under the circumstances of this case to compel a reversal of the judgment * * *." (See also People v. Williams (1860), 17 Cal. 142, 147; People v. Mahoney (1927), 201 Cal. 618, 626–627, 258 P. 607; People v. Frank (1925), 71 Cal.App. 575, 581–582, 236 P. 189; People v. Robinson (1946), 73 Cal.App.2d 233, 237, 166 P.2d 17; Citti v. Bava (1928), 204 Cal. 136, 138–139, 266 P. 954; Steele v. Wardwell (1943), 57 Cal.App.2d 642, 648–652, 135 P.2d 628, in which the appellate court commented "This was a close case and the statements made by the court may well have been the determining factor. In our opinion, the entire case should be reversed * * *"; Anderson v. Hagen (1937), 19 Cal.App.2d 714, 726, 66 P.2d 168, in which the court reversed, saying, "Because the evidence on this vital point was in direct conflict, the error of admitting this [hearsay] testimony cannot be said to be without prejudice"; Curtis v. McAuliffe (1930), 106 Cal.App. 1, 8, 288 P. 675; Taylor v. Aetna Life Insurance Co. (1933), 132 Cal. App. 434, 439, 22 P.2d 775.)

[9] Plaintiff urges that the trial court's action in denying defendant's motions for mistrial and for new trial, made upon the ground of misconduct of plaintiff's counsel in moving to amend in the presence of the jury establishes the absence of prejudice to defendant (see Cope v. Davison (1947), 30 Cal.2d 193, 180 P.2d 873, 171 A.L.R. 667.) However, as held in Citti v. Bava (1928), supra, 204 Cal. 136, 140, 266 P. 954, "While it is true that the conclusion of the trial court on the motion for a new trial is entitled to much consideration its decision thereon is not conclusive on appeal."

There is no contention that the making and granting of the motion, under the circumstances shown, can be justified as a permissible request for, and making of, comment on the evidence. (See Cal.Const. Art. VI, sec. 19.)

The judgment is reversed and the cause remanded for a new trial.

SHENK, EDMONDS and SPENCE, JJ., concur.

GIBSON, Chief Justice, and TRAYNOR, Justice.

We dissent.

It is our opinion that this cause was correctly decided by the District Court of Appeal and that the judgment should be affirmed for the reasons set forth in the opinion of that court by Justice Goodell, 220 P.2d 398.

CARTER, Justice.

I dissent.

The majority decision by four justices of this court reaches a new low in search for a reason to reverse a judgment abundantly supported by evidence and based upon the unanimous verdict of a jury. That judgment was approved by a most learned, fair, careful, experienced and able trial judge, and affirmed by the unanimous decision of a District Court of Appeal composed of three learned and able justices with many years of trial and appellate court experience. Sanguinetti v. Moore Dry Dock Co., Cal.App., 220 P.2d 398. Four members of this court (a majority) have reached a decision diametrically opposed to that reached by seven other members of the judiciary—the trial judge, three District Court of Appeal justices and three members of this court. That a miscarriage of justice will result from this decision is apparent from a review of the record before this court, but the detriment to our system for the administration of justice from the effect of this decision will far outweigh the loss to plaintiff who is denied justice in this case. The decision reached here by these four justices strikes a lethal blow at the very heart of our judicial system—trial by jury. It holds, in effect, that a jury may not be informed as to the state of the pleadings in a civil action. This is contrary to all authorities on the subject. While the majority concede that it is not error for the jury to be informed as to the amount claimed in the prayer of the complaint, they hold that it is *incurable misconduct amounting to reversible error* if a motion to amend the complaint for the purpose of increasing the amount prayed for is made in the presence of the jury. There is not a scintilla of reason or common sense in such holding. It is so lacking in consideration of the realities of the situation that it may be said to be naive. In 26 years of practice before the courts of this state, I heard many such motions made and granted in the presence of the jury, and in none of those cases did the jury award the increased amount prayed for. No question was ever raised by either court or counsel as to the propriety of such practice, as no one ever thought that anyone could be misled thereby, it being well understood among lawyers and laymen alike that a demand for damages is not evidence that plaintiff is entitled to damages in any sum whatsoever. The fact that in this case the jury awarded the increased amount prayed for is no indication that they were influenced by the motion which they heard or the ruling of the court thereon which they did not hear. Although the majority opinion so implies, jurors are not fools. Even if they are not lawyers, they have much more intelligence than the majority opinion indicates. They are entitled to know, and should be informed, at the beginning of the trial the amount plaintiff is seeking to recover. It certainly would have been proper for either the court or counsel to inform the jury at the beginning of the trial that plaintiff was claiming $50,000 damages. And, as the majority seem to concede, if the motion to amend had been made out of the presence of the jury, it would have been proper for the court to have advised the jury at the close of the case, as it did, that they could not return a verdict in excess of $75,000, the amount then claimed. Is the conclusion not inescapable that the jury then must know that plaintiff had amended his complaint by increasing his demand? But, suppose a juror did not know how or why the amount of the demand had been increased, and made inquiry of the court, could the court not say that plaintiff had moved to amend his complaint by increasing the amount prayed for, and the court had allowed such amendment? To say that such statement is not permissible is to make ostriches out of jurors, or place them behind an "iron curtain," a practice which should not be countenanced in any enlightened system for the administration of justice. The reactionary philosophy of the majority opinion is so out of harmony with present day concepts of trial procedure that it resembles some of the skeletons of the dead past, when conservative minded judges found such technical and fine-spun reasons for reversing judgments based upon jury verdicts, that the people of this state were constrained to adopt § 4½ of Article VI of our Constitution, imposing upon appellate courts the requirement of determining that any error committed by a trial court must have resulted in a miscarriage of justice before reversing a judgment based upon a jury verdict. The liberal concept of this constitutional provision has evidently not impressed the majority of this court, as there is no suggestion in the majority opinion that a miscarriage of justice resulted from the alleged error in this case.

It is conceded by the majority that their decision is not supported by a single decision of any court of this state. It seems logical that an unprejudiced mind seeking to rationalize the absence or lack of such decisions during a period of over 100 years of the judicial history of this state, and the further fact that the statutory law of the state is silent on the subject, would conclude that the practice of making such motions in the presence of the jury had never heretofore been considered improper or cause for assignment of misconduct or error. It should be apparent to every unprejudiced mind, as it is to me, that the majority, in seizing upon this motion as the sole ground for a reversal of the judgment in this case, is simply creating a mythical error which exists only in hypertechnical illusion. Certainly, with the widespread practice of making such motions in the presence of the jury—well-known to trial lawyers throughout the state—some appellate court at some time during the history of the state would have been called upon to hold such practice error if there was the slightest basis for such holding.

Furthermore, if such practice were as deadly and vicious as the majority opinion indicates, it is more than probable that the public liability insurance companies and utilities would have instructed their lobby group to prevail upon the Legislature to enact legislation prohibiting such practice. That this has not occurred is persuasive evidence of the recognized propriety of such practice.

To my mind the majority decision in this case is an abuse of the judicial process. We have here four judges, without precedent or authority, announcing a rule contrary to the practice which has prevailed throughout the history of the state, and contrary to the holding of seven equally trained and experienced judges. What these four judges have done here is in direct conflict with the view expressed by Mr. Justice Cardozo in his work entitled "The Nature of the Judicial Process." He there declared, at page 112: "My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired."

What these four judges have done here is likewise contrary to the philosophy expressed by Judge Salmond at pages 192–193 of the 10th edition of his work on Jurisprudence, where he said: "Where, then, do courts derive those new principles, or *rationes decidendi*, by which they supplement the existing law? They are in truth nothing else than the principles of natural justice, practical expediency, and common sense. Judges are appointed to administer justice—justice according to law, so far as the law extends, but so far as there is no law, then justice according to nature."

In essence, what these four judges have done here, is to blindly announce a court-made rule which not only finds no support in history, precedent, experience, custom, practice, logic, reason, common sense or natural justice, but is in utter defiance of each and all of these standards.

I shall now proceed to demonstrate the fallacy of the holding of the majority in this case.

Section 473 of the Code of Civil Procedure provides:

"The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; * * * The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; * * *."

As was said in Isaacson v. Union Trust Co., 95 Cal.App. 633, 638, 273 P. 119, 121, "The matter of the allowance of trial amendments to the pleadings rests in the sound discretion of the court, and such ruling should not be disturbed upon appeal in the absence of a showing that prejudice resulted therefrom to the extent that the party aggrieved was deprived of a substantial right or placed in a position where it may be said that he was deprived of a fair trial." See, also, Unruh v. Kauffman, 205 Cal. 238, 244, 270 P. 440; Duffey v. General Petroleum Corp., 93 Cal.App.2d 757, 759, 209 P.2d 986; 21 Cal.Jur. 181 Further, "It is the settled law of this state that motions to amend pleadings to the end that justice may be promoted are to be liberally granted." Rabe v. Western Union Tel. Co., 198 Cal. 290, 299–300, 244 P. 1077, 1080; Klopstock v. Superior Court, 17 Cal.2d 13, 19, 108 P.2d 906, 135 A.L.R. 318; Carter v. Lothian, 133 Cal. 451, 452, 65 P. 962; McDougald v. Hulet, 132 Cal. 154, 162, 64 P. 278; Crosby v. Clark, 132 Cal. 1, 8, 63 P. 1022; Guidery v. Green, 95 Cal. 630, 633, 30 P. 786. The same rules are applicable to amendments increasing the amount of damages alleged. Duffey v. General Petroleum Corp., supra; Hoffman v. Southern Pacific Co., 101 Cal.App. 218, 229, 281 P. 681. It has also been held that the right to amend should not be denied merely because the new matter to be added may have been known to the applicant at the time of filing his original pleading. Tolbard v. Cline, 180 Cal. 240, 245, 180 P. 610; Kroplin v. Huston, 79 Cal.App.2d 332, 340, 179 P.2d 575. Moreover, an amendment increasing the damage claim does not change the cause of action stated. Babcock v. Jewell, 110 Cal.App. 323, 325–326, 294 P. 30.

Defendant asserts that the trial court abused its discretion in granting the motion to amend because defendant was thereby surprised and prejudiced. This contention is predicated upon the assertion that defendant's liability insurance was limited to $50,000, the original amount of the prayer, and accordingly "the insurance company had been the sole party in interest" prior to the amendment. This argument is also utterly devoid of merit. Two days prior to the making of the motion, the attorney supposedly representing defendant was informed that it would be made. While defendant's request for a continuance was denied, no good reason for granting it appears. Defendant's attorney informed the court at that time that he knew he was supposed to proceed with defendant's case and he stated that defendant's witnesses were present. The increased prayer, as heretofore shown, did not change the cause of action and it did not inject any new issue into the case. Any arrangement between defendant and its insurance carrier as to the conduct of the litigation could not possibly affect plaintiff's right to amend.

Since the granting of the motion to amend would be a proper exercise of discretion by the trial court, the sole question is whether, under the circumstances here, the making of that motion in the presence of the jury constituted prejudicial misconduct requiring a reversal of the judgment.

Section 657 of the Code of Civil Procedure authorizes the granting of a new trial for: "1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial; * * *."

Under this section, then, the alleged misconduct of counsel, in order to warrant a reversal of a judgment and the granting of a new trial, must be such as to have denied a fair trial to the complaining party. Robinson v. Western States Gas & Elec. Co., 184 Cal. 401, 407, 194 P. 39; Langford v. Kosterlitz, 107 Cal. App. 175, 186, 290 P. 80; Mullanix v. Basich, 67 Cal.App.2d 675, 686, 155 P.2d 130; Gerberich v. Southern California Edison Co., 26 Cal.App.2d 471, 476, 79 P.2d 783; Coppock v. Pacific Gas & Elec. Co., 137 Cal.App. 80, 90, 30 P.2d 549. It is also elementary that a trial judge is in a better position than an appellate court to determine whether a verdict resulted wholly, or in part, from the asserted misconduct of counsel and his conclusion in the matter will not be disturbed unless it is plainly wrong. Cope v. Davison, 30 Cal. 2d 193, 203, 180 P.2d 873, 171 A.L.R. 667; Walling v. Kimball, 17 Cal.2d 364, 368–369, 110 P.2d 58; Lafargue v. United Railroads, 183 Cal. 720, 724, 192 P. 538. As was said in Hatfield v. Levy Brothers, 18 Cal.2d 798, 814, 117 P.2d 841, 849, "A denial of a motion for a new trial made upon the ground of misconduct of counsel, although not binding on this court, is entitled to great weight upon an appeal in which complaint is made of the misconduct." Here, the trial court denied motions for mistrial and for a new trial based upon the asserted misconduct of plaintiff's attorney.

Viewed in the light of these principles, then, the majority decision is that the action of counsel for plaintiff had the effect of denying a fair trial to defendant and the rulings of the trial court to the contrary, giving them the great weight to which they are entitled, were plainly wrong, I do not believe that there is any misconduct involved in the action of plaintiff's attorney. In my opinion this contention does not even present a substantial question worthy of extended discussion by an appellate court. But even assuming the existence of misconduct, it is impossible to conceive how *any* prejudice to defendant could have resulted, especially in view of the evidence, the instructions and the rulings of the trial court on the question.

Plaintiff's case was based upon the theory that defendant was negligent in maintaining the tug engine with a defective clutch and that this negligence was the proximate cause of plaintiff's injuries. Plaintiff testified that shortly after he became the tug operator for defendant in September, 1945, he discovered that the clutch would stick so that he could not shift from forward speed. When this happened he would sometimes have to leave the pilot house and go down to the engine room to disengage the clutch. He could not shut off the engine from the pilot house. He reported the clutch difficulties to Acosta, the plant engineer in charge of maintenance and repairs. He also spoke to Acosta about getting an entirely new engine, including a clutch. Acosta considered such a purchase but decided against it. Although plaintiff requested it, no work was done on the clutch when the tug was taken out of the water in January, 1947, to repair the propeller. The clutch difficulties increased in February and April of 1947. Knapp, the general superintendent of defendant company, told plaintiff that they were not going to spend any more money on the "Queen Mary."

Annalla and Hagstead, who worked as deck hands on the tug, also testified as to difficulties with the clutch.

Plaintiff also testified that the clutch again stuck on May 2, 1947, while the tug was being used to bring a barge from San Francisco. Plaintiff called to Annalla to come into the pilot house and take the wheel. He then went down to the engine room and turned the clutch control there. Both Annalla and Pestano, the crane operator on the derrick barge, corroborated plaintiff's account of this incident.

Plaintiff further testified that, subsequently on the same day, while he was attempting to dock the barge at the 8th Street pier on the Oakland side of the bay, the clutch stuck once more. The tug was then about 12 to 15 feet from the barge, coming in at a slight angle toward it at a speed of about two or three knots per hour. Plaintiff was unable to shift into neutral. He did not have time to go down to the engine room as he was afraid that the tug would ram into an oil tank and cause an explosion. He thought that the best thing to do in order to stop the tug was to throw a line on the barge and jump over to secure it. When the tug was about two or three feet away from the barge, plaintiff threw a looped line (called a spring or breast line) on the barge and jumped over to the barge at the same time. He was off balance from this fast movement and his legs slipped over the side of the barge. His left leg was pinned between the barge and the tug as the tug came in and that leg was crushed. He finally pulled himself up on the deck of the barge. (He did *not* testify that he jumped back and forth from the tug to the barge.) The forward motion of the tug was stopped by the rope that plaintiff had managed to get over a bit on the barge. He testified that, but for the faulty clutch on the tug, he would not have jumped from the tug to the barge. He did not have time to shout to the deck hand (who was then on the barge). There was no other eyewitness testimony of the accident.

Pestano, the crane operator, did not see the accident. He heard plaintiff shout for help and found him with both legs hanging over the side of the barge. The tug was then about two feet away from the barge and was tied to the barge by the spring line described by plaintiff.

Annalla was on the barge and did not witness the accident. He found plaintiff dangling over the side of the barge. The spring line was then fastened between the barge and the tug. This line was ordinarily used to pull a barge into dock and it was his, Annalla's, job as deck hand to handle this rope. After the accident he went aboard the tug and shut off everything.

Knapp, the general superintendent, testified that plaintiff had told him that the tug needed a new engine. He knew that there was trouble with the clutch and he discussed that with plaintiff (although he also testified that he did not recall specific complaints about the clutch). The engine was old and obsolete and the purchase of a new one had been considered. Plaintiff was not required by any rules of the company to keep the tug in repair. Acosta, the plant engineer, was the person in charge of such matters. After the accident the clutch was taken out of the tug and repairs were made on it.

Acosta testified that he was in full control of repairs of equipment in the yard in 1947. He talked to plaintiff a number of times about the general condition of the Moore No. 2, but he did not recall specific complaints about the clutch. After the accident, when the clutch was repaired it showed only normal wear. Some parts were replaced. He did not find anything which, in his opinion, would cause the clutch to stick. (The marine shop foreman gave the same opinion.)

The testimony of Exter, a foreman of defendant's marine machinists in 1947, was that plaintiff had told him of the clutch sticking. Exter would take complaints to Acosta as he could not do anything without a work order from the latter. The tug was not operated between the time of the accident and the time the clutch was taken out and repaired. When they took the clutch cover off they could see that the bushings and gears were badly worn and that there was a great deal of slack in the pins and rods which operated the clutch from the pilot house.

Forrest, a marine machinist employed by defendant, stated that he found the clutch in bad shape after the accident and he had it taken completely out and sent it to the shop. After the clutch was restored to the tug, he checked it and it did not look safe to him. He thought that the clutch would still stick. He did some more work on it and thereafter the clutch functioned properly.

Dr. Wagner, an orthopedic surgeon, gave the only medical testimony. He began treating plaintiff after October 4, 1947. The x-ray pictures show fractures of the tibia of the left leg which extend into the ankle joint. The union of the upper and lower fragments of the tibia will not be complete for several more months. There is an irregularity of the ankle joint due to the fractures which is called an "overlapped foot." Such a condition is generally progressive. A marked deossification can be seen.

The clinical treatment of plaintiff was also described. The cast was kept on the left leg until December, 1947. The leg was bandaged until about February, 1948. Then a foot drop brace was applied which has a spring action designed to force the foot upwards into a normal (right angle) position. Plaintiff was constantly in pain during this period. The brace did not force the foot back into a normal position and the foot is now permanently deformed as a result of the injury and deossification. Plaintiff cannot move his foot upwards at all. He lacks about 50 degrees of normal movement of the left foot. If he walks at all it will be with a limp.

Plaintiff is slowly recovering from a paralysis of the peroneal nerve and there is a permanent weakness and wastage of the muscles in the left leg.

The only operations possible are an amputation of the left foot or a fusing of the ankle joint, making it rigid. The pain will grow worse, but plaintiff should avoid either of these operations until the pain becomes so severe and is combined with so much limitation of activity that an operation becomes absolutely necessary. He will have to wear the leg brace continuously unless an operation is performed.

The disability is such that plaintiff "will not be able to return to any duty that requires constant standing or walking, or any physical effort such as climbing or doing overhead work. He should not engage in any activity that would require walking on rough surfaces, or do anything which calls for the correct maintenance of one's balance." His walking capacity, as to distance, is very limited. (Plaintiff set the limit at about two blocks and stated that he cannot walk at all without severe pain.)

Plaintiff testified that he is 33 years of age and is married. In addition to his employment with defendant as a tug operator and a rigger, he has worked as a commercial fisherman and on a pile driver. He knows no other occupations. His education was halted when he was in the eighth grade. His wage as a tug operator was $1.80 per hour, but the wage scale has since been raised. His wages for the last four weeks prior to the accident totalled $407.46. During the past 8 or 9 months plaintiff has been working in a radio shop, taking care of it when the mechanic goes out on calls. His earnings from this vary from $5 to $20 a week, depending upon the time the store is left in his care.

There is evidence that the life expectancy is 36.12 years for a white male of plaintiff's age. The amount required to pay a person of that age the sum of $250 a month until he is 65 years of age, computing the interest at 2%, would be $64,048. If the interest rate were 2½%, the necessary amount would be $60,055. The sum of $56,430 would be required if the interest rate were 3%. There is testimony that insurance companies would guarantee an interest rate of between 2% and 2½%.

Defendant gave no evidence on the subject of damages. In his opening statement, defendant's counsel stated that the existence of injuries was conceded and the only question for the jury was whether defendant was liable therefor.

The instructions to the jury contained the following:

"You will distinctly understand that in this charge the Court is in no manner or form expressing, or desires to express, any opinion on the weight of the evidence, or any part thereof; nor does the Court express any opinion as to the truth or falsity of the testimony of any witness; nor does the Court in any manner or form express its opinion that any alleged fact in this case is or is not proven. * * * (Q)uestions of fact * * * are matters entirely within your province. * * *

"If the judge of this Court has at any time during this trial used any language, or has seemed to you to indicate the opinion of the judge as to any question of fact * * you must not be influenced thereby, but must determine yourselves all questions of fact without regard to the opinion of anyone else. * * *

"You will be instructed on the subject of the measure of damages in this action, because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. *I, of course, do not know whether you will need instructions on the measure of damages, and the fact that they have been given to you must not be considered as intimating any opinion of my own on the issue of liability or as to which party is entitled to your verdict.* * * *

"You are instructed that the law prescribes no definite measure of damages, but the law leaves such damages to be fixed by you as your discretion dictates and as, under all the circumstances, may be just and proper. * * *

"The damages must be reasonable and cannot be in excess of the amount alleged in the complaint, namely $75,000.00. * * *

"You are instructed that if your verdict is in favor of the plaintiff, then in fixing damages you should award such amount as will compensate for the injuries sustained, if any, including such amount as will compensate for the pain and suffering endured. * * *

"If you believe from the evidence that the injuries sustained by the plaintiff are permanent in their character, then you will take into account the period of time in the future during which he will be expected to suffer such pain, humiliation, disfigurement, or disability, if any. * * *" (Emphasis added)

The jury was also fully and fairly instructed on the elements of damages and the subjects of negligence, contributory negligence, comparative negligence and proximate cause.

The motion to amend the prayer of the complaint was argued and granted in chambers. And although the jury was never informed of the court's action on the motion, the majority opinion intimates that the jury could infer from the emphasized instruction, naming the amount of plaintiff's claim, as increased by the amendment, that the motion was granted, that the granting of the motion indicated the trial judge's belief that the evidence warranted a larger recovery than that originally claimed, and that it is possible that the jury disregarded all the other explicit instructions and returned a verdict based upon this double inference. The foregoing review of the evidence and instructions demonstrates that this asserted possibility is devoid of reality, and is the result of fantastic speculation by the majority, who utterly ignore the determination of the trial court that defendant suffered no prejudice as a result of the motion or instruction.

The majority opinion states that prejudice to defendant must have occurred from the asserted misconduct because the doctrine of comparative negligence was involved in this action and for the further reason that the jury returned its verdict within 35 minutes after the case was submitted to it. No reason is stated, and I am unable to find any reason, why the jury should have taken more time to resolve the simple factual issues presented. The only real disputed question as to a probative fact was whether or not the clutch was defective. Although considerable evidence was received during the trial, most of it was directed to that issue.

Neither is there any explanation as to how the presence of the comparative negligence doctrine indicates prejudice to defendant. Even if it be assumed that the jury could infer from the instructions that the motion to amend the prayer was granted and that this was done because the trial judge believed that the evidence of plaintiff's injuries would justify a larger verdict, *there is nothing whatsoever upon which an inference could be based that the court believed that plaintiff was entitled to recover at all.* As heretofore quoted, the jury was specifically charged that instructions on the subject of the measure of damages were given so that the instructions would completely state the law applicable to the issues in the case, and that "the fact that they (instructions on damages) have been given to you must not be considered as intimating any opinion of my own on the issue of liability or as to which party is entitled to your verdict." Moreover, the motion to amend was made at the close of plaintiff's case and before the introduction of any evidence by the defendant, that is, before the trial judge had any knowledge as to the merits of defendant's case contesting its liability.

The evidence also indicates that the crucial and decisive question in the case was whether or not defendant negligently maintained defective equipment. The principal defense was lack of negligence—lack of *any* responsibility for the serious injuries admittedly suffered by plaintiff. Plaintiff introduced substantial, if not overwhelming, evidence in support of his position on this point. Even the witnesses for defendant conceded that the tug engine was obsolete and in need of some repairs. It is apparent that the jury was entitled, if not compelled, to find in favor of plaintiff on the matter of defendant's negligence. There was little, if any, evidence tending to show *any* contributory negligence on the part of plaintiff. The nature of the case is such that it is highly improbable that the jury could have believed plaintiff's evidence concerning defendant's negligence while at the same time rejecting plaintiff's evidence as to his lack of contributory negligence. There was no dispute as to the nature and extent of plaintiff's injuries, the extent and duration of his disability, the degree to which his earning power was impaired, or the amount of pain and suffering caused by the injuries. The verdict is not excessive in view of this evidence. See McNulty v. Southern Pacific Co., 96 Cal.App.2d 841, 846–851, 216 P.2d 534, and cases cited.

The majority opinion states: "This is not * * * a case in which the error can be said to be nonprejudicial because the issues were resolved on undisputed or overwhelming evidence." It is obvious that this statement is not based upon anything in the record. As has been pointed out, the evidence on the matter of damages was "undisputed," and this is the matter as to which the alleged misconduct or error was directed. Also, the evidence in favor of plaintiff on the subject of contributory negligence could accurately be described as "overwhelming." The testimony indicating defendant's negligence also appears to be clear and convincing.

The majority decision here is entirely out of line with the California decisions dealing with misconduct of counsel. Thus, in the following cases the ruling of the trial court in denying a new trial on the ground of misconduct of counsel was not disturbed upon appeal, although the instances of alleged misconduct as set forth below are far more serious than the actions of plaintiff's attorney in this case:

During the trial plaintiff's attorney read the contents of incompetent (hearsay) documents in the presence of the jury. Robinson v. Western States Gas & Elec. Co., supra, 184 Cal. 401, 407, 194 P. 39; see, also, Lafargue v. United Railroads, supra, 183 Cal. 720, 192 P. 538. Defendant's counsel, in a personal injury action, repeatedly got before the jury the idea that their side had an eyewitness to the accident who saw the plaintiff run in front of the train, although such a witness was never produced. Rather v. City and County of San Francisco, 81 Cal.App.2d 625, 637, 184 P.2d 727. Counsel for the plaintiff habitually mispronounced the defendant's name during the trial and in the course of argument referred to plaintiff as an American boy, the inference being that counsel was purposely trying to prejudice the jury against a man with a foreign name. Porter v. Granich, 136 Cal.App. 523, 531, 29 P.2d 220; see, also, Spear v. Leuenberger, 44 Cal.App.2d 236, 112 P.2d 43. In his opening statement in an action for assault and battery, the attorney for the plaintiffs referred to the defendants as desperadoes, racketeers, cattle gangsters and drunken brutes. Deevy v. Tassi, 21 Cal.2d 109, 121–122, 130 P.2d 389; see, also, McCabe v. Cheseldine, 117 Cal.App. 526, 4 P.2d 282. Defendants' counsel, in arguing to the jury, accused plaintiff's attorney of refusing to settle the case because of his wish to receive a large fee. In his opening statement plaintiff's attorney had stated that "we have sued for $15,000." The verdict was in favor of plaintiff for $600, although the injuries were serious. Johnson v. McRee, 66 Cal. App.2d 524, 529–530, 152 P.2d 526; see, also, Fintel v. Engelbrecht, 28 Cal.App.2d 23, 81 P.2d 1044. In an action against a contractor for personal injuries sustained by an employee of the Bureau of Reclamation during the construction of a dam, there were repeated references by plaintiff's attorney to the fact that the contractor held a $35,000,000 contract to construct the dam. Miller v. Pacific Constructors, Inc., 68 Cal.App.2d 529, 551–552, 157 P.2d 57; see, also, Alberts v. Lytle, 1 Cal.App. 2d 682, 691–692, 37 P.2d 705. Plaintiff's counsel made statements which tended to suggest to the jury that plaintiff was impoverished and without means, where there was no evidence of such poverty. Hodge v. Weinstock, Lubin & Co., 109 Cal. App. 393, 401–403, 293 P. 80; see, also, Oakes v. Baker, 85 Cal.App.2d 168, 192 P.2d 460. The attorney for plaintiff represented to the jury in his opening statement the existence of facts (that defendant corporation's equipment was old and obsolete, undermanned, and without proper safeguards) which plaintiff was prepared to prove, but which plaintiff did not attempt to prove and which he allegedly knew at the time could not be proved. Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 737–738, 81 P.2d 950, 118 A.L.R. 533; see, also, Adylott v. Key System Transit Co., 104 Cal.App. 621, 286 P. 456. In his closing argument counsel for plaintiff, without any basis in the evidence, painted defendant company as accustomed to callously trying to "beat" claims of its patrons by such means as subjecting them to the expense of lawsuits, influencing witnesses by suggestion and confusing evidence, and the use of political influence. Jonte v. Key System, 89 Cal.App.2d 654, 201 P.2d 562; see, also, Girard v. Irvine, 97 Cal.App. 377, 275 P. 840. In discussing the testimony of a police officer who had been a witness for the plaintiff, defendant's attorney referred to police scandals not connected with the case. Woebbe v. Sperry, 48 Cal.App.2d 340, 344, 119 P.2d 743; see, also, Walters v. Evick, 93 Cal.App. 1, 15–16, 268 P. 1061. In an action on promissory notes to which the defense of fraud was interposed, counsel for defendants repeatedly referred to the verdict of the jury in another case finding the procurer of the notes guilty of fraud, although the judgment in that case had been reversed. Liberty Bank v. Nonnenmann, 96 Cal.App. 478, 487–488, 274 P. 568; see, also, Draper v. Hellman Commercial T. & S. Bank, 203 Cal. 26, 40–41, 263 P. 240; Weddle v. Loges, 52 Cal.App.2d 115, 123, 125 P.2d 914.

Comparing the majority decision with the following criminal cases dealing with the misconduct of prosecuting attorneys as set forth below in which judgments of conviction were affirmed, it seems that the life and liberty of the defendants in those cases was not as highly valued as are the funds of defendant corporation here:

In the course of his case the prosecuting attorney called out the name of defendant's wife as a witness, although he was aware that she had not been subpoenaed and he had no intention of doing so. Also, in his argument to the jury, the prosecuting attorney made repeated references to the defendant's failure to call his wife as a witness, stating that she was present when the events in question took place. People v. Klor, 32 Cal.2d 658, 662–664, 197 P.2d 705. Defendant, a Negro, was tried before an all Negro jury. In his opening statement the district attorney referred to race prejudice and stated, in effect, that the jury should convict the defendant if they wanted to avoid public criticism for favoring a defendant of their own race. People v. Fisher, 86 Cal.App. 2d 24, 32–33, 194 P.2d 116; see, also, People v. Macias, 77 Cal.App.2d 71, 88–89, 174 P.2d 895. The district attorney, in arguing to the jury that the death sentence should be imposed in a murder case, said that if the defendant were sentenced to life imprisonment he would probably be paroled in ten or twelve years and intimated that the penal institutions were very crowded so that paroles were granted without regard to merit in order to provide space for incoming prisoners. People v. Caetano, 29 Cal.2d 616, 619–620, 177 P.2d 1. The closing argument of the district attorney contained references to the defendants as "gamblers," "ex-convicts," "gangsters," and statements to the effect that the county should be protected from such people. People v. Brancato, 83 Cal. App.2d 734, 740–742, 189 P.2d 504.

It is evident from defendant's briefs that its real complaint is directed to the giving of the instruction naming the amount of the prayer. From the citation of cases in the majority opinion dealing with misconduct of the trial judge, Berguin v. Pacific Elec. Ry. Co., 203 Cal. 116, 263 P. 220; People v. Mahoney, 201 Cal. 618, 258 P. 607; People v. Robinson, 73 Cal. App.2d 233, 166 P.2d 17; Steele v. Wardwell, 57 Cal.App.2d 642, 135 P.2d 628; People v. Frank, 71 Cal.App. 575, 236 P. 189, and the giving of erroneous instructions, Clement v. State Reclamation Board, 35 Cal.2d 628, 220 P.2d 897; Intagliata v. Shipowners & Merchants Towboat Co., 26 Cal.2d 365, 159 P.2d 1; Oettinger v. Stewart, 24 Cal.2d 133, 148 P.2d 19, 156 A.L.R. 1221; People v. Dail, 22 Cal.2d 642, 140 P.2d 828; Pipoly v. Benson, 20 Cal.2d 366, 125 P.2d 482, 147 A.L.R. 515; People v. Williams, 17 Cal. 142; Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350; Starr v. United States, 153 U.S. 614, 14 S.Ct. 919, 38 L.Ed. 841, it is apparent that the majority consider this instruction to be improper and a ground for reversal of the judgment, especially in view of the fact that the jury would not have learned of the granting of the motion but for this instruction.

The law of California has long been settled to the contrary. The propriety of such an instruction was upheld in Lahti v. McMenamin, 204 Cal. 415, 421, 268 P. 644, 646, and the following comments are pertinent here:

"Defendant suggests a number of circumstances happening during the trial which, he contends, had the effect of improperly influencing the jury to render the verdict in the amount specified, and which he claims was excessive. The first of these was an instruction of the court to the effect that the jury might, after considering all the elements contributing to plaintiff's damage, 'resolve what sum will fairly compensate her for the injury and loss, if any, sustained by her; *not exceeding, however, the amount prayed for in the complaint, to wit, $16,312.10.'* That portion of the instruction italicized is the portion to which defendant particularly objects. An instruction of this character is usually given in negligence cases, and it is difficult to understand how a jury in such class of cases can be properly instructed by the court without employing language similar to that used by the court in the instruction complained of. There could be no error, therefore, in so instructing the jury. *If the defendant desired the jury further instructed to the effect that the amount named therein did not necessarily furnish any criterion for the amount of their verdict, it was his duty to ask for such qualifying instruction, and, not having done so, he cannot be heard to complain that it was not given."* (Emphasis added.) See, also, Blanton v. Curry, 20 Cal.2d 793, 129 P.2d 1; McNulty v. Southern Pacific Co., supra, 96 Cal.App.2d 841, 852–853, 216 P.2d 534, and cases cited; Powers v. Shelton, 74 Cal.App.2d 757, 765–766, 169 P.2d 482; cases collected in 2 A.L.R.2d 459, 461.

Here, assuming that the instruction naming the amount of plaintiff's claim as amended, was capable of being misinterpreted in view of the other instructions on the matter of liability and damages, the defendant, not having requested a clarification of the instruction, is in no position to complain of the lack thereof at this time. An instruction to the effect that the amount of the prayer was merely a claim, and not evidence, would have been proper and, presumably, would have been given if requested. See California Jury Instructions, Civil, Instructions 173 et seq.; Eastlick v. City of Los Angeles, 29 Cal.2d 661, 673–674, 177 P.2d 558, 170 A.L.R. 225.

The precise contention raised here was expressly rejected in Buswell v. City and

County of San Francisco, 89 Cal.App.2d 123, 134, 200 P.2d 115, 121, where it was said:

> "The second point brings up the question of whether the court should mention to the jury the amount sued for. *It is contended that by so doing the judge in effect is telling the jury that in the particular case he believes that the evidence warrants a finding that any sum within the amount sued for would be reasonable to award as damages.* Many judges do not mention the sum sued for. Others do. In Hollinger v. York Rys. Co., 225 Pa. 419, 74 A. 344, 17 Ann.Cas. 571, the practice of mentioning the amount is condemned. On the other hand, B.A.J.I., page 198 states: 'It is thought by some that the amount of damages alleged in the complaint should not be stated to the jury in the instructions. The editorial committee feel that this is largely a matter of discretion with each judge in each case. However, it is the opinion of a majority of the committee that there is no sound reason why the judge should not state the amount claimed. *Counsel may do so, and usually do.* We believe that the intended effect of the instruction is made more certain by a frank statement of the amount claimed. A noticeable avoidance of that fact might arouse curiosity. It may well be doubted that a defendant ever is injured by an instruction as here suggested. On the other hand, we feel certain that there have been cases when a defendant was helped by a jury's impression that the plaintiff filed an exorbitant claim. Such a result, however, is plaintiff's own harvest.' Assuming that the Hollinger case states the better practice, we cannot say that in California the mentioning of the amount sued for is error." (Emphasis added.)

Similarly, in Norfolk & Western Ry. Co. v. Earnest, 229 U.S. 114, 33 S.Ct. 654, 57 L.Ed. 1096, an action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., involving the doctrine of comparative negligence, an instruction was given to the effect that, if the verdict was for the plaintiff, he should be awarded "such an amount of damages, not exceeding $20,000" as would compensate him for the injury. The prayer was for the sum stated. Rejecting the argument that this instruction "erroneously conveyed to the jury an intimation that a finding that the plaintiff's damages amounted to $20,000 was justified by the evidence," the court stated at p. 120 of 229 U.S., at page 656 of 33 S.Ct.: "Looking at the entire paragraph we think it could not have been understood by the jury as conveying such an intimation, and that the words now criticized could only have been understood as marking a limit beyond which the jury could not go." See, also, Chesapeake & Ohio Ry. Co. v. Carnahan, 241 U.S. 241, 244–245, 36 S.Ct. 594, 60 L.Ed. 979; Dowell, Inc., v. Jowers, 5 Cir., 182 F.2d 576, 580; Ritzman v. Mills, 102 Cal.App. 464, 468 et seq., 283 P. 88.

The instruction questioned by the defendant in Eastlick v. City of Los Angeles, supra, 29 Cal.2d 661, 177 P.2d 558, 566, 170 A.L.R. 225, was as follows: "The amount of damages alleged in the complaint to have been suffered by plaintiff is $8,895.00. This allegation is merely a claim and is not evidence and must not be considered by you as evidence. It does, however, fix a maximum limit and you are not permitted to award plaintiff more than that amount." The complaint was amended at the trial to conform to the proof. As amended, it alleged items of damage for injuries caused by the defendant's negligence totalling $7,385 (general damages of $5,000 and special damages of $2,385), but the prayer was changed to $8,895. The defendant maintained that the amount stated in the instruction should have been the total sum of the items of alleged damages "rather than the inflated figure of the prayer." In reply to this contention, it was said 29 Cal. 2d at page 674, 177 P.2d at page 566: "Regardless of the merit of defendant's objection, which properly should have been made in the trial court so that the discrepancy could have been there obviated (Lahti v. McMenamin, 204 Cal. 415, 421, 268 P. 644), no harm appears to have resulted from the inaccuracy in the instruction. The verdict was for $5,000, well within the figure conceded by defendant to represent the limit of plaintiff's total demand." See, also, Sonstelie v. Bush, 102 Cal.App. 396, 399–400, 283 P. 336. It is noteworthy that the defendant's counsel in that case did not consider it worthwhile to argue that it was improper to instruct the jury accurately as to the amount of plaintiff's claims, as amended.

Blanton v. Curry, supra, 20 Cal.2d 793, 806, 129 P.2d 1, 8, was an action to recover damages for personal injuries sustained by the plaintiffs when struck by an automobile driven by defendant Curry. It was held not to be prejudicial error for the trial court to instruct the jury, "by way of explanation and example," that the judgment in the case might be for $10,000 against Curry, the driver, but could be for only $5,000 against Koehler, the owner of the car, unless it was found that Koehler was the principal and Curry was the agent, in which case there was no such limitation as to Koehler. The jury returned a verdict of $10,000 against each of the defendants. (It does not appear whether the jury accomplished its task within a 35 minute period.) Certainly such an instruction is more pregnant with possibilities of prejudice than is the one given in the present case.

I am unable to see any distinction of substance between the Lahti case and the situation presented here. It is a common practice for the attorney for the plaintiff to state to the jury the amount of his claim and I am not aware that that practice has ever been questioned. See Johnson v. McRee, supra, 66 Cal.App.2d 524, 530, 152 P.2d 526; Ritzman v. Mills, supra, 102 Cal.App. 464, 472, 283 P. 88; California Jury Instructions, Civil, p. 198. Under the Lahti case it is also proper for the court to instruct the jury as to the amount of the prayer. If the plaintiff states his claim in his opening statement the jury will learn from the instructions whether or not an amendment to the prayer has been allowed during the trial, regardless of whether the motion to amend is made in the presence or absence of the jury. A distinction based upon the latter factor is a distinction without a difference. The only possible conclusion to be derived from the majority opinion is that Lahti and similar cases are to be overruled *sub silentio*. Apparently, the Pennsylvania rule is to be adopted to the effect that it is reversible error for plaintiff's counsel, Carothers v. Pittsburg Rys. Co., 229 Pa. 558, 79 A. 134; Quinn v. Philadelphia Rapid Transit Co., 224 Pa. 162, 73 A. 319; Vaughan v. Magee, 3 Cir., 218 F. 630; see Porter v. Zeuger Milk Co., 136 Pa.Super. 48, 7 A.2d 77, or the trial court, Hollinger v. York Rys. Co., 225 Pa. 419, 74 A. 344; Reese v. Hershey, 163 Pa. 253, 29 A. 907, to state to the jury the amount of damages claimed in a negligence action, despite the established law and practice in this state to the contrary. Thus, the majority opinion cites with apparent approval the case of Vaughan v. Magee, supra, which states and follows the Pennsylvania rule.

The New York cases cited by defendant deal with the propriety of allowing amendments to the complaint during the trial and therefore they are not in point. The basis of the decision in Kenney v. South Shore Natural Gas & Fuel Co., 126 App.Div. 236, 110 N.Y.S. 503, 504, is illustrated by the following comments in the opinion: "It seems that the court on the trial of an action may, in the proper exercise of its discretion, permit plaintiff to amend his complaint by increasing the amount of damages demanded. (Citations.) Although the exercise of this power of the trial court has received frequent recognition and approval, *we do not think such an amendment can properly be permitted simply upon plaintiff's motion, unsupported by any suggestion explaining why application for the privilege had not previously been made at Special Term, or excusing the apparent laches in not earlier presenting such application.* Even if application had been made at Special Term for the desired amendment, some reason showing the propriety of the amendment at that time would have been required or the motion would have been properly denied. * * *

"We do not now assume to pass upon the question whether the plaintiff on proper application may not be entitled to such an amendment; *but hold simply that, as the* *case is now presented to us, the motion was improperly granted* and the verdict therefore unwarranted." (Emphasis added.) The dissenting opinion advanced the view that the allowance of the amendment increasing the damage claim was within the discretion of the trial court.

It is apparent that the decision in that case was not based upon misconduct of counsel or the giving of erroneous instructions, but upon the ground that an amendment to the complaint should not be allowed during the trial unless the plaintiff states sufficient reasons why the amendment was not requested at an earlier time when the facts were known to him. That it is within the discretion of the trial court to grant a motion to amend the complaint at the close of the plaintiff's case, as was done here, cannot be seriously questioned in this state. As has been shown, the California practice is to liberally allow such amendments and the trial court's exercise of its discretion in this matter will rarely be disturbed upon appeal.

Sandresky v. Erie R. Co., 91 Misc. 67, 153 N.Y.S. 612, also involves the propriety of granting leave to amend since it appears that the plaintiff therein was permitted to amend his complaint by increasing the damage claim *at the opening of the trial*. The trial court's action at that time could not possibly support an inference that the judge believed a higher verdict was warranted.

Pfeil v. Klein, 247 App.Div. 510, 286 N.Y.S. 721, cites and follows the Kenney and Sandresky cases and the language used in the opinion indicates that it is based upon the same point.

In Sawyer v. Munson S. S. Line, D. C., 7 F.Supp. 193, the Kenney case is cited for the following proposition: "Motion to increase the amount of damages should not be made at the trial of the action, but should be made in advance of the trial."

It is true that there are statements in the Kenney and Pfeil cases to the effect that an application for leave to increase the amount of the prayer should not be made in the presence of the jury. However, there seems to be some doubt in New York as to whether the jury should ever be informed or instructed in any manner as to the amount of unliquidated damages claimed by the plaintiff. See, apparently applying the Pennsylvania rule, Gilbertson v. Forty-Second St. etc. Ry. Co., 14 App. Div. 294, 43 N.Y.S. 782, 784; Rost v. Brooklyn Heights R. Co., 10 App.Div. 477, 41 N.Y.S. 1069, 1072–1073; Wersebe v. Broadway & S. A. R. Co., Misc. 472, 21 N.Y.S. 637.

Decisions merely stating that the motion to amend was not made in the presence of the jury, as in Buswell v. City and County of San Francisco, supra, 89 Cal.App.2d 123, 133, 200 P.2d 115; Sohman v. Metropolitan St. Ry. Co., 56 Misc. 342, 106 N.Y.S. 1033; Walker v. Bradt, 225 App.Div. 415, 233 N.Y.S. 388; Prichard v. Dubinsky, 338 Mo. 360, 89 S.W.2d 530; Hinchliffe v. Wenig Teaming Co., 274 Ill. 417, 113 N.E. 707, obviously do not provide any support for the majority decision here.

The wild charges directly or inferentially made by defendant of "recklessness in advocacy," "deliberate and gross misconduct" which was "deliberately designed to mislead and prejudice the jury," "vicious practice," and "fraud and deceit" on the part of plaintiff's attorney are entirely without foundation in the record. Neither does the reproduction of false, misleading and sensationalized newspaper articles in its petition for hearing add anything at all to the legal sufficiency of defendant's argument. Such tactics suggest that defendant's counsel believes this court to be incapable of determining the importance of the points made without the "assistance" of newspaper reporters.

We have here nothing more than a routine motion and a customary instruction. I see no misconduct in the making of the motion and no error in the instruction. I cannot understand how the combination of the two factors results in reversible error under any circumstances, unless, as heretofore suggested, the majority believe that the Pennsylvania rule should be adopted in this state, making the amount of damages claimed a sacred subject, not to be touched upon by counsel or the court. Equally fanciful, yet finding support in the opinion of the majority here, would be the argument that the granting of a motion to amend the complaint in other respects to conform to the proof during the trial, as where a new or different cause of action or issue is injected into the case, constitutes reversible error on the ground that this suggests to the jury that the trial judge believes the evidence warrants the plaintiff's recovery under the amendment.

In my opinion there was no error or misconduct in the trial court and the judgment should be affirmed.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

102 Cal.App.2d 909

McCARTY et al. v. RASO.

Civ. 7842.

District Court of Appeal, Third District, California.

March 19, 1951.

Guy A. McCarty and another sued A. Raso for unlawful detainer alleging a breach of covenant and conditions of a lease relative to the manner in which defendant farmed premises leased to him by plaintiffs. The Superior Court, Merced County, D. Oliver Germino, J., rendered a judgment declaring a forfeiture of the lease and ordering restitution of the premises to the plaintiffs, and the defendant appealed. The District Court of Appeal, Peek, J., held that the action for unlawful detainer would lie, notwithstanding the fact that the lease did not expressly provide for re-entry or forfeiture for breach of the covenants and conditions concerned.

Affirmed.

Landlord and tenant 🔑290(2)

Lessors were not precluded from maintaining their action for unlawful detainer under statute even though lease did not expressly provide for re-entry or forfeiture for alleged breach of covenants and conditions relating to manner in which lessee farmed premises. Code Civ.Proc. § 1161, subd. 3.

Alvin Gerlack, San Francisco, Landram & Silveira, Merced, for appellant.

C. Ray Robinson, by W. Eugene Craven and James A. Cobey and Margaret A. Flynn, all of Merced, for respondent.

PEEK, Justice.

This is an appeal by defendant from a judgment declaring a forfeiture of a lease and ordering restitution of the premises to the respondent plaintiffs, and from the order denying defendant's motion for judgment notwithstanding the verdict.

The settled statement upon which the cause is presented states that the sufficiency of the evidence to sustain the material allegations of plaintiffs' complaint is not questioned. Defendant's sole contention is that plaintiffs are precluded from maintaining their action for unlawful detainer under section 1161, subd. 3 of the Code of Civil Procedure, since the lease did not expressly provide for re-entry or forfeiture for his alleged breach of the covenants and conditions thereof relative to the manner in which he farmed the premises.

The pertinent portions of the section above mentioned provide that a tenant of real property is guilty of unlawful detainer when he continues in possession after "a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held", and he has failed to perform following service upon him of the three day notice as therein provided.

While the remedy here in question exists solely by virtue of the statute, and the statute, is to be construed, Woods-Drury, Inc., v. Superior Court, 18 Cal.App.2d 340, 63 P.2d 1184, still it has long been the established rule in this state that an action for unlawful detainer will lie for the breach of "any covenant or condition of the lease"; Silva v. Campbell, 84 Cal. 420, 24 P. 316, 317, upon the giving of the notice provided for in said statute. See also Kelly v. Teague, 63 Cal. 68; Knight v. Black, 19 Cal.App. 518, 126 P. 512.

The cases cited by appellant in support of his contention are not in point since each involved situations where there was either a failure to give proper notice or a failure to prove the breach of a condition or covenant contained in the lease. Both of those elements are conceded in the settled statement upon which this appeal is presented. Lastly it should be noted that defendant has asserted no equitable defense.

The judgment and order are affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

102 Cal.App.2d 872

PEOPLE v. GLOSTER.

Cr. 4528.

District Court of Appeal, Second District, Division 1, California.

March 19, 1951.

Hearing Denied April 16, 1951.

Joseph Gloster was convicted in the Superior Court, Los Angeles County, William M. Byrne, J., of grand theft, and he appealed from orders denying a new trial and denying a motion in arrest of judgment. The District Court of Appeal, Doran, J., held that the evidence supported the conviction.

Orders affirmed.

1. Criminal law ⚷1144(13)

In determining whether evidence is sufficient to support verdict of conviction, District Court of Appeal will assume truth of facts supporting verdict which jury reasonably may have found from the evidence, along with reasonable inferences which it might have drawn therefrom.

2. False pretenses ⚷49(1)

In prosecution of housing contractor for grand theft based upon alleged making of false affidavit in reliance on which complaining witnesses made payment, evidence supported conviction.

3. Criminal law ⚷829(1)

Where defendant's requested instruction covered same matter contained in given instruction, no prejudice resulted from refusal.

◆

Fink, Rolston, Levinthal & Kent, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Justice.

After trial before a jury, appellant was convicted of grand theft in stealing $8,700 from Edward and Violet Kahn on or about June 22, 1949. Three other similar counts, charging different dates of alleged theft, had been dismissed before trial. After conviction defendant was granted probation for a period of four years.

Appellant, a general building contractor, entered into certain contracts with Mr. and Mrs. Kahn on January 4, 1949, whereby appellant was to construct three residences on property located at the corner of Beverly Boulevard and Highland Avenue, and at 601 and 607 Seward Street, in Los Angeles. Appellant was to receive a flat sum for the houses, the total of which was $43,500, to be paid in five equal payments as the work progressed.

Mr. and Mrs. Kahn, the complaining witnesses, made four of the five progress payments, each in the amount of $8,700, during which period the parties appear to have been on friendly terms. After making the fourth of such payments appellant was discharged; thereafter the Kahns completed construction of the buildings and sold the same.

There is evidence that a faithful performance bond had been discussed by the contracting parties but such practice was not followed. Later, although no such provision was incorporated in the contract, the appellant contractor agreed to and did present to the owners, certain affidavits prior to receiving the progress payments, certifying "that all materials and labor have been paid for that have been incurred at the three locations". The last of these affidavits making such statement, dated June 22, 1949, acknowledges receipt of the fourth payment "for the installation of plumbing fixtures, roof tile, interior and exterior plaster, wall and floor tile board, sash and doors".

At the time this last affidavit was presented and the fourth payment made, there was some discussion between the parties and Mr. Burke, a friend of the Kahns, with regard to whether bills had been paid, and appellant stated that all bills were paid except a few small disputed ones which would be taken care of. Mr. Kahn then gave appellant the fourth payment of $8,700. There is a conflict of evidence as to whether the Kahns examined certain bills and receipts at that time.

The following bills incurred in May, 1949, previous to the appellant's presentation of the affidavit, were never paid: roof tile, $1,414.92; electrician, extra work, $88.25; sash and windows, $1,676.17, on which item there was given a $98 credit for returned merchandise. Lumber, delivered prior to June 1, 1949, in the sum of $738 was unpaid on June 22, 1949, the date of the affidavit. Likewise, concrete work done prior to the same date, in the amount of $1,639, was not entirely paid for on that date.

Appellant contends that the evidence is insufficient to sustain the verdict, and in this connection argues that "The defendant was entitled to receive the fourth progress payment as a matter of law"; that the written contract did not call for an affidavit and that "The complaining witnesses did not rely upon the affidavit in making the payment", but rather relied on the progress of the building and an examination of receipts, etc. It is further insisted that "The defendant, by his conduct, clearly showed he had no intent to defraud". Appellant also complains of the trial court's refusal to give a requested instruction that "if it is shown that the defendant used a devise to obtain property which was at that time due to the defendant, such obtaining of property is not a crime".

Appellant testified, as summarized in respondent's brief, "that when he took the executed affidavit to the Kahns for the fourth payment, he and the Kahns discussed unpaid bills, and he explained which bills had not been paid, and why; and that Mr. Kahn told him not to pay bills on which he claimed a credit until he got the credit. (Rep.Tr. pp. 156–157.) He testified to facts, which, if true, would indicate that a disclosure as to unpaid bills was made to the Kahns at that time, except the concrete bill, which was for work being done. He testified further that he had expended over $27,000 for materials and labor for the Kahn's houses, and had received payments from them totaling $26,100. (Rep.Tr. p. 160.)"

Both of the complaining witnesses testified to belief and reliance upon the affidavit and that the fourth payment would not have been made except for such reliance. It is submitted by the respondent that "The question of whether or not the victim relied upon the false representations is one for the jury, and its findings will not be disturbed on appeal if there is evidence to support it. It is likewise urged that "The intention of a person charged with theft by false pretenses is a fact to be determined by the trier of fact".

The jury was here confronted with evidence showing the making of a false affidavit, and with the testimony of the complaining witnesses that $8,700 was then paid to appellant in reliance on such affidavit. Likewise before it was evidence to the effect that certain bills were discussed at that time which appellant promised to take care of.

[1,2] As respondent's brief states, "assuming the truth of the facts supporting the verdict which the jury reasonably may have found from the evidence, along with the reasonable inferences which it might have drawn therefrom, as the court of appeal must do, there is sufficient evidence here to support the verdict of conviction".

[3] In respect to the trial court's refusal to give appellant's requested instruction hereinbefore quoted, it is to be noted that the jury was duly instructed that if the defendant "was entitled to receive it (the money paid) at the time it was delivered to him, then you shall find the defendant not guilty". With this instruction before it, it is evident that there was no resulting prejudice from the refusal to

give defendant's requested instruction covering the same matter.

Notwithstanding certain discrepancies in the evidence and alleged uncertainties and contradictions pointed out by appellant, the record discloses substantial evidence in support of the verdict. No reversible error has been made apparent.

The orders appealed from are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; SHENK, J., dissenting.

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103 Cal.App.2d 55

FLANNERY v. KOCH et al.

Civ. 18190.

District Court of Appeal, Second District, Division 2, California.

March 23, 1951.

Rehearing Denied April 9, 1951.

Hearing Denied May 22, 1951.

Alyce Flannery brought action against Robert A. Koch and Marie A. Liberto to recover for the death of one who had been a guest in the automobile of Marie A. Liberto when it was struck at intersection by automobile driven down through street by Robert A. Koch, when Marie A. Liberto failed to stop at stop sign. The Superior Court of Los Angeles County, Orlando H. Rhodes, J., rendered a judgment for the plaintiff, and the defendants appealed. The District Court of Appeal, Wilson, J., held that Marie A. Liberto had not been guilty of wilful misconduct within meaning of automobile guest statute, and that Robert A. Koch had not been negligent, and that, therefore no recovery could be had as against either defendant.

Judgment reversed.

1. Automobiles 🔑181(1)

No recovery from driver of automobile for death of guest could be had unless it was established that accident resulted from intoxication or willful misconduct of driver. Vehicle Code, § 403.

2. Automobiles 🔑181(1)

"Willful misconduct" within meaning of automobile guest statute is the intentional doing of something in operation of a motor vehicle which should not be done or intentional failing to do something which should be done under circumstances disclosing knowledge, express or implied, that an injury to a guest would be a probable result. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Willful Misconduct".

3. Automobiles 🔑181(1)

The mere failure of an automobile driver to perform a statutory duty is not, alone, "willful misconduct" within meaning of automobile guest statute. Vehicle Code, § 403.

4. Automobiles 🔑181(1)

Failure of automobile driver to stop at stop sign before entering through street did not constitute "willful misconduct" within meaning of automobile guest statute. Vehicle Code, § 403.

5. Automobiles 🔑181(1)

Error of judgment of automobile driver in mistakenly believing that when she was unable to stop at stop sign she could accelerate her speed and cross ahead of automobile approaching intersection on through street, did not constitute "willful misconduct" within meaning of automobile guest statute. Vehicle Code, § 403.

6. Appeal and error 🔑1003

An appellate court will not weigh evidence on appeal.

7. Appeal and error 🔑930(1)

An appellate court on appeal must view evidence in light most favorable to successful litigant.

8. Appeal and error 🔑1001(1)

Questions of negligence and proximate cause are ordinarily questions of fact, which, when determined by trial court, in automobile collision case, will not be disturbed if there is any evidence of a substantial nature to support judgment.

9. Appeal and error 🔑1001(1)

If there is no substantial evidence to support the findings and judgment, reviewing court will reverse.

10. Appeal and error ⚷**1001(1)**

Where there is no substantial conflict in the evidence in automobile collision case, and negligence or absence of negligence is apparent from the record as a matter of law reviewing court has power so to declare and to determine the related issues accordingly.

11. Automobiles ⚷**181(1)**

Where motorist was driving at night at speed of 25 miles an hour on through street protected by stop signs, and when he observed that automobile on side street was not going to stop at stop sign, he applied his brakes sufficiently to lock the wheels, and he had only a fraction of a second before collision, he was not guilty of negligence and was not liable for death of guest in other automobile.

12. Automobiles ⚷**171(13)**

Motorist who was proceeding on through street protected by stop signs, had right to assume that automobiles coming from side streets would stop at stop signs before entering through highway and would yield right of way to him.

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Parker, Stanbury, Reese & McGee and Harry D. Parker, all of Los Angeles, for appellant Koch.

Early, Maslach, Foran & Tyler, Robert E. Early and John B. Connolly, all of Los Angeles, for appellant Liberto.

French & Indovina and F. Walter French, all of Santa Monica, for respondent.

WILSON, Justice.

Two automobiles driven by defendants collided causing the death of one Audrey Flannery who was a guest in the car operated by defendant Liberto. This action, which was brought by the mother of Audrey for the wrongful death of her daughter, resulted in a verdict and judgment against defendants, both of whom have appealed.

Fourteenth Street is a public highway extending northerly and southerly in the city of Santa Monica and is crossed by Carlyle Avenue at right angles. Fourteenth Street is a through highway. Veh. Code, sec. 82.5.[1] Stop signs are located as authorized by section 471 of the Vehicle Code at the northeast and southwest corners of the streets. The accident occurred after dark. Defendant Koch was driving at a speed of about 25 miles an hour southerly on 14th Street. Miss Liberto was driving at between 25 and 30 miles an hour westerly on Carlyle Avenue. Koch was alone in his car; Miss Liberto was driving a single-seated coupe and had in the seat with her four girl friends as passengers. The evidence is uncontradicted that Miss Liberto's vision was not obscured by her passengers. When she entered Carlyle at 16th Street one of her passengers stated that Carlyle was a dangerous street. As she approached 15th Street she sounded her horn, slowed down and changed into second gear, crossing the street at about 15 miles an hour. As she proceeded toward 14th Street one of her passengers said, "There is a boulevard stop sign there." Miss Liberto testified she did not see the stop sign until the front of her car "was just about up to it." At about the same time she saw the headlights of Koch's automobile; she immediately put her foot on the brake pedal and when she found she could not stop her car she stepped on the accelerator in an attempt to clear the intersection ahead of Koch's car.

As Koch approached the intersection, at about a point 50 feet north of the line of Carlyle, he observed the Liberto car and when it appeared that the latter car was not making the boulevard stop he immediately applied his brakes, leaving skid marks 25 and 27 feet in length, respectively. The cars collided at about the center of the intersection.

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[1] Section 82.5 reads: "A 'through highway' is a highway or portion thereof at the entrance to which vehicular traffic from intersecting highways is required by law to stop before entering or crossing the same, and when stop signs are erected as provided in this code."

The Liberto Appeal

[1–5] Since the decedent was a guest in Miss Liberto's car plaintiff cannot recover unless she has established that the death "proximately resulted from the intoxication or wilful misconduct" of Miss Liberto. Veh. Code, sec. 403.[2] Inasmuch as there is no evidence of intoxication plaintiff's case must rest entirely upon a showing of wilful misconduct, which has been defined as "intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result." Turner v. Standard Oil Co., 134 Cal.App. 622, 626, 25 P.2d 988, 990; Stewart v. Kelly, 68 Cal.App.2d 122, 127, 155 P.2d 850; Mish v. Brockus, 97 Cal.App.2d 770, 773, 218 P.2d 849. "The mere failure to perform a statutory duty is not, alone, willful misconduct." Stewart v. Kelly, supra, 68 Cal.App.2d at page 126, 155 P.2d at page 852. Hence Miss Liberto's failure to stop before entering 14th Street did not constitute willful misconduct as defined in the cases above cited and in many others in which the subject has been considered. When she ascertained that she could not stop her car she then endeavored to avoid a collision by accelerating her speed in an attempt to cross ahead of Koch's car. While this was an error of judgment and in an applicable case might be construed as negligence, it is not wilful misconduct. Paraphrasing Meek v. Fowler, 3 Cal.2d 420, 426, 45 P.2d 194, Miss Liberto's attempt to cross the intersection in advance of the Koch car was the result of her conclusion, mistaken though her judgment may have been, that she could safely cross 14th Street before the arrival of the other car. Upon the record it cannot be said that she proceeded in utter disregard of, or that she was utterly indifferent to, the rights of her guests. While her judgment under the circumstances confronting her may have been poor, it does not appear that she was wantonly reckless in exposing her guests to danger, nor did her conduct partake of a wilful, intentional wrong.

The cases relied on by plaintiff are not in conflict with those above cited. For example, in Allen v. Robinson, 85 Cal.App.2d 617, 193 P.2d 498, the driver of the car previously to the accident, against his passenger's remonstrance, had been racing with another car at a speed of from 45 to 50 miles an hour. Later, as they approached a red light his passenger requested him to slow down and he disregarded the warning until he almost struck a car ahead. Thereafter he drove at an excessive speed and "whipped around" other cars. He entered an intersection at 35 miles an hour and collided with another car. Obviously such a case is not applicable to the facts now before us. Other cases cited by plaintiff are equally inapplicable.

The Koch Appeal

[6–10] The action against Koch depends upon whether the evidence sustains the charge of negligence against him. We approach this branch of the case under the familiar rules that an appellate court will not weigh evidence, that it must view the evidence in the light most favorable to the successful litigant, and that questions of negligence and proximate cause are ordinarily questions of fact which, when determined by the trial court, will not be disturbed if there is any evidence of a substantial character to support the judgment. However, if there is no substantial evidence to support the findings and judgment the reviewing court will reverse. Osgood v. City of San Diego, 17 Cal.App.

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[2] Section 403 reads: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver."

2d 345, 352, 62 P.2d 195; Chase v. Jonkey, 12 Cal.App.2d 365, 368 ff, 55 P.2d 1229. When there is no substantial conflict in the evidence and negligence or the absence of negligence is apparent from the record as a matter of law, the reviewing court has power so to declare and to determine the related issues accordingly. Huetter v. Andrews, 91 Cal.App.2d 142, 145, 204 P.2d 655; Edgar v. Citraro, 112 Cal.App. 178, 180, 297 P. 654.

[11, 12] Applying the foregoing rules, the judgment against Koch must be reversed since we do not find in the record any evidence of negligence on his part. He was driving at a lawful speed on a through street protected by stop signs; he was familiar with the street and knew the stop signs were located at the intersection of Carlyle Avenue; he had the right to assume that cars, including that of Miss Liberto, would stop before entering the through highway and would yield the right of way to him. Inouye v. McCall, 35 Cal.App.2d 634, 638, 96 P.2d 386; Silva v. Market Street Ry. Co., 50 Cal.App.2d 796, 800, 123 P.2d 904. Upon observing that the Liberto car was not stopping he applied his brakes sufficiently to lock the wheels. Plaintiff asserts that he should have swerved his car to the right or to the left in an effort to avoid the collision. Since the time available for the exercise of his judgment was only a fraction of a second he cannot be charged with negligence because of his failure to determine in which direction he should have turned. If he had turned to the right and the Liberto car had continued on its course, as it did, a collision was inevitable; if he had turned to the left and Miss Liberto's car had suddenly stopped he would have struck her car broadside.

Viewing the entire record in the light most favorable to plaintiff, we do not find any evidence of negligence on the part of defendant Koch.

Judgment reversed as to both defendants.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER, J., dissenting.

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102 Cal.App.2d 800

PEOPLE v. ROBINSON.

Cr. 2595.

District Court of Appeal, First District, Division 2, California.

March 13, 1951.

Rehearing Denied March 28, 1951.

George William Robinson was convicted in the Superior Court in and for the county of Alameda, Charles Wade Snook, J., of forgeries, and he appealed. The District Court of Appeal, Schottky, J., pro tem., held that the evidence supported the judgment of conviction.

Affirmed.

1. Forgery 🔑**44**

In forgery prosecution, where record showed passing of checks, that they were forgeries and were not paid, and defendant's connection with other defendants in passing them, corpus deliciti was amply proved. Pen. Code § 470.

2. Criminal law 🔑**1166½(1)**

In forgery prosecution, no reversible error was presented by defendant's claim that he had been unable to employ the counsel he wanted because money taken from his person when he was arrested was not released, where record showed that defendant had been ably defended, that there was strong reason to believe that money taken from him had been money derived from passing of spurious checks and therefore properly impounded as evidence, and where record further showed that no complaint had been made to trial court before or during trial. Pen. Code, § 470.

3. Criminal law 🔑**741(2)**

In forgery prosecution, question of identification was one for jury. Pen. Code, § 470.

4. Criminal law 🔑**372(12), 673(5)**

In forgery prosecution, there was no error in admission of evidence tending to show that defendants had passed other forged checks before and after passing of ones set forth in information, where other offenses shown to have been committed by defendants were of similar pattern to offenses charged and showed common scheme and design to defraud business men by use of fraudulent and forged payroll checks, and where jury was properly instructed as to weight and effect of such evidence and that it could not be considered for any other purpose than to show whether or not defendants had been motivated by fraudulent intent or whether there had existed in their minds any plan, scheme or design into which fitted description of any of offenses for which defendants were being tried. Pen. Code, § 470.

5. Criminal law ⚷369(2), 370, 371(1, 12), 372(1)

Evidence which is pertinent and tends to prove crime alleged is not to be rejected because it also tends to prove commission of other crimes, or because it may tend to prejudice defendant in minds of jurors, and generally such evidence is admissible when it tends to establish intent or guilty knowledge, motive, common scheme or plan embracing commission of two or more crimes so related to each other that proof of one tends to establish other, when it tends to connect defendant with crime charged. Pen. Code, § 470.

6. Forgery ⚷44

Forgery conviction was sustained by evidence. Pen. Code, § 470.

7. Criminal law ⚷742(1)

In prosecution of three defendants for forgery, where one defendant admitted his guilt and sought to assume sole responsibility for offenses committed, truth or falsity of his testimony was matter for consideration of jury. Pen. Code, § 470.

8. Criminal law ⚷768(1)

In forgery prosecution, jury was fully and fairly instructed on law applicable to case, notwithstanding failure of trial court to give comprehensive cautionary instruction that testimony of victims of alleged forgery should be carefully scanned. Pen. Code, § 470.

9. Criminal law ⚷1119(1)

On appeal from forgery conviction, where record did not support appellant's contentions that he had been forced to trial represented by counsel who were not zealous in his behalf and failed to make timely objections to immaterial evidence, that evidence against him had been manufactured, that his counsel had refused to subpoena material witnesses favorable to him, that he had been forced to trial with an admittedly guilty defendant, and that his counsel had refused to subpoena handwriting experts to prove his innocence, such contentions could not be considered upon appeal. Pen. Code, § 470.

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Joseph L. Bortin, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice, pro tem.

Appellant George William Robinson was jointly charged by information in five counts with Lester Sparks and Willie R. Rogers with the commission of forgeries in violation of sec. 470 Penal Code. In count one it was charged that said defendants on September 24, 1948, in Alameda County, "with intent to defraud Alfred S. Benjamin, the Pacific Pipe Company, a corporation, Oscar Inyard, the Bank of America National Trust and Savings Association, a corporation, and each of them, falsely made, altered and forged a certain" payroll check of the Pacific Pipe Company in favor of Oscar Inyard for the sum of $84.72, and "uttered, published and passed the same as genuine and true to Alfred S. Benjamin, knowing the same to be false, altered and forged." The other four counts are identical with the first count except only as to the number of the alleged check and name of the persons alleged to have been intended to be defrauded, the second, third, fourth and fifth counts each alleging that the check set forth therein was uttered, published and passed to Maurice Brooks, Nathan Sirowitz, Arthur Mattal, and Frank Milana, respectively. Defendants Robinson and Sparks were also charged with the conviction of prior felonies, and both admitted such convictions.

After a trial before a jury, which lasted four days, all three defendants were found guilty. Motions for a new trial were denied, and defendant Robinson alone has appealed from the judgment and the order denying his motion for a new trial.

Upon the trial all three defendants were represented by the same two attorneys. Appellant Robinson has filed this appeal in propria persona and filed an opening brief prepared by himself with some assistance from others. This court thereafter appointed counsel to assist appellant and said counsel appeared and made an oral argument in behalf of appellant but appellant evidently did not choose to accept the assistance of the counsel appointed by the court as appears from statements in the closing brief, also prepared by appellant. As is not unusual in briefs prepared by laymen, appellant's briefs make many statements of alleged facts which are outside of the record, and make charges and accusations against officers, prosecuting attorneys and defense counsel which find no basis or support in the record.

We have studied the entire record with great care because we felt that appellant did not possess the experience or ability to enable him to adequately present the points of his appeal, and we are forced to conclude that not only was there ample evidence to support the conviction of appellant but the evidence in our opinion was so clear and convincing that it is difficult to understand how the jury could have arrived at any other verdict. Furthermore we are convinced that appellant was ably defended in the trial court and that he received a fair and impartial trial.

Before discussing the numerous contentions, if they may be called such, of appellant, we shall summarize the factual situation as disclosed by the record and as accepted by the jury.

On the night of August 28, 1948, a man named Oscar Inyard, a resident of Los Angeles, met a young lady on Central Avenue in Los Angeles, had a few drinks with her, and the next think he remembered was that he awoke the next morning in a hallway minus his checkbook, his Bulova wrist watch, his Social Security card, his Notice of Classification Card, his army discharge papers, and other personal identification papers.

On the night of September 23, 1948, appellant Robinson and defendants Rogers and Sparks came to the King's Hotel at 1207—7th Street in Oakland together and registered and were given rooms. The next day a number of checks, dated September 24th were cashed in the City of Oakland. These checks were all purported payroll checks of Pacific Pipe Company, were all for $84.72 and were all made payable to Oscar Inyard. One was cashed at a liquor store at 1818—7th Street by a man identified as defendant Rogers. Another was cashed at a liquor store at 1796—7th Street by a man identified as Robinson, and still another was cashed at a clothing store at 1586—7th Street by a man identified as defendant Rogers. Around 10 or 11 o'clock that night appellant and defendants Rogers and Sparks came to the manager of King's Hotel, Mrs. Rosa Winston, and Robinson asked her if she would keep some money which she understood was Rogers' money, and he then gave her $130 and said "Now don't give this money up until I come back for it" and she then gave him a receipt stating that she had received $130 from W. M. Rogers.

The following day, September 25th, another check was cashed at a shoe store on San Pablo Avenue by a man identified as defendant Rogers. A few hours later on the evening of the 25th the offense giving rise to the fifth count of the information was committed when Rogers entered the D & M Liquor Store, 3823 San Pablo Avenue, Emeryville, and passed a check on Frank Milana the proprietor and one of his clerks. Rogers represented himself to be Oscar Inyard and exhibited papers including an army discharge in support of his claim. He endorsed the name "Oscar Inyard" on the check.

In the meantime Officer John L. Doyle of the Emeryville Police was called to the D & M Liquor Store and drove to a point near the entrance in an automobile. At this point Doyle joined another officer, Officer Guneri, who was seated in a second police car and who was watching the store. Officer Doyle then saw defendant Rogers walk out of the D & M Liquor Store and get into the back seat of an automobile which started up immediately. The officers drove their own cars into positions in front of and behind this automobile in which Rogers was riding thus forcing it to stop. Defendant Robinson was seated at the wheel of the vehicle and defendant Sparks was sitting in the front seat on Robinson's right. Officer Doyle turned a flashlight on defendant Rogers and as he did so Officer Doyle heard the sound of something falling to the floor in the rear part of the automobile occupied by the defendants. At the same time Officer Guneri asked Rogers if he cashed a check and Rogers said, "Yes, I did".

Officer Guneri took Rogers back to the D & M Liquor Store where Mr. Milana produced the check just received from Rogers, towit, Exhibit 11. While inside the D & M Liquor Store, Officer Guneri asked Rogers for his wallet and it appears that Rogers did not have it in his possession at that moment.

While Officer Guneri, Mr. Milana and defendant Rogers were busy inside the liquor store, Officer Doyle, who had remained at defendants' car with Robinson and Sparks, found a wallet, in the back of their vehicle. When Rogers was brought back to the car by Officer Guneri, Rogers said, "I lost my wallet" to which Doyle having discovered Exhibit 43 replied, "I found it. Here it is."

Officer Doyle searched Rogers' wallet and found the Classification Notice stolen from Mr. Inyard in Los Angeles and the photostatic copy of a genuine photostatic copy stolen from Mr. Inyard. He also found a purported identification card of Pacific Pipe Company in the name and address of Oscar Inyard, 3810 West Street, Oakland and bearing Mr. Inyard's forged signature; an uncashed check purporting to be a check of Pacific Pipe Company made out to Oscar Inyard for $84.72, being the same type of check as the ones hereinbefore referred to as having been passed by defendants Rogers and Robinson; the receipt given by Mrs. Rosa Ella Winston to defendant Robinson for the $130 deposit made by him for defendant Rogers; and four strips of "green safety paper being notations as follows:

"Total Comp.	98.00
Unemp. Ins.	.98
Withholding	12.30
Total Ded.	13.28
Net Total	84.72"

Officer Doyle found a second wallet in the automobile which contained a number of other checks of Pacific Pipe Company, all payable to Oscar Inyard and also some 48 uncashed checks, purported payroll checks of Stellar Negligee Inc., each payable to Cora Wood in the sum of $63.27.

All three defendants were taken to the Emeryville Police Station where they were booked and searched. Defendant Sparks was found to be in possession of another spurious identification card of Pacific Pipe Company for Oscar Inyard and another purported identification card in the name of Oscar Inyard and bearing Inyard's forged signature. When searching the defendants at Emeryville station the police found $233.44 in possession of appellant Robinson, $77.79 in possession of defendant Rogers and $849.44 in possession of defendant Sparks.

Appellant Robinson upon being searched was found to be in possession of a checkbook, checks, filled in stubs and bank deposit book, in the name of Eddie Dooley as depositor and Jefferson San Pedro Branch, Bank of America as depositary; an identification card issued by U. S. Employment Service purporting to identify Oscar Inyard of 317 N Street; a California Operator's license in the name of John Wesley Robinson but shown by a handwriting expert to be appellant Robinson's own; and also a temporary California operator's license bearing name and address of Oscar Inyard 317 N Street, Sacramento, but which was not Mr. Inyard's license. This last operator's license was used by appellant Robinson on September 24, 1948, as identification in passing a similar check by Pacific Pipe Company on Yen Jang, a merchant of 1545—7th Street Oakland, appellant representing himself to be Oscar Inyard, and was also used by him in passing another spurious check in Sacramento earlier in the month.

There was also evidence that appellant Robinson passed two other false checks in

Oakland on September 24th, representing himself to be Oscar Inyard and displaying the photostatic copy of Inyard's army discharge to prove it. More false checks were found but it would unnecessarily prolong this opinion to enumerate them. Also two bottles of ink eradicator were found in defendant Sparks' room in the hotel where all three defendants were living. There was also evidence that the Bulova wrist watch which was stolen from Oscar Inyard on the night of August 28th was found on appellant Robinson's arm about six inches up his arm when he was searched at the county jail, it not having been found when he was first searched at the Emeryville jail.

The Social Security card of Oscar Inyard found in Rogers' wallet was the same one used for identification by appellant Robinson and defendant Rogers in passing the checks described in the information, and it is clear from the various exhibits introduced and from the testimony in the record that appellant Robinson and defendants Rogers and Sparks were engaged jointly in the operation of passing the checks enumerated in the information and other checks as well.

All of the defendants took the stand. Defendant Rogers made a strong effort to take all of the blame for the offenses charged and to clear defendants Robinson and Sparks. Both Robinson and Sparks denied their guilt.

[1] Appellant first contends that the corpus delicti was not established and states that there was no proof that appellant had any intent to defraud the persons upon whom the checks were alleged to have been passed. The record, however, shows the passing of the checks, that they were forgeries, that they were not paid and the appellant's connection with the other defendants in passing them. The corpus deliciti as to each count was amply proved.

[2] Appellant next contends that he was denied the right to have legal counsel of his own choice. He claims that the money that was taken from his person when he was arrested was not released and therefore he was unable to employ the counsel he wanted. However the record shows that appellant was ably defended, and also that there was strong reason to believe that the money taken from appellant was money derived from the passing of the spurious checks and properly impounded as evidence. Furthermore the record shows no complaint made to the trial court before or during the trial.

[3] Appellant next asserts that perjured testimony was used against him but there is nothing in the record to support such assertion and the jury which heard the testimony evidently believed it. The question of identification was one for the jury.

[4] Appellant next complains that he was prejudiced by the admission of evidence tending to show that defendants had passed other forged checks before and after the passing of the ones set forth in the information. However the other offenses shown to have been committed by defendants were of a similar pattern to the offenses charged and showed a common scheme and design to defraud business men by the use of fraudulent and forged payroll checks. The jury was properly instructed as to the weight and effect of such evidence and that it could not be considered for any other purpose than to show whether or not defendants were motivated by fraudulent intent or whether there existed in their minds any plan, scheme or design into which fitted the description of any of the offenses for which defendants were being tried. The general rule is stated in 8 Cal. Jur. pp. 60–61, sec. 168, as follows:

[5] "Evidence which is pertinent and tends to prove the crime alleged is not to be rejected because it also tends to prove the commission of other crimes, or because it may tend to prejudice the defendant in the minds of the jurors. While it is impossible to state the cases in which such evidence is admissible with categorical precision, generally speaking such evidence is admissible when it tends to establish intent or guilty knowledge, motive, a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, when it tends to connect the defendant with the crime charged * * *"

See also People v. Peete, 28 Cal.2d 306, 317, 169 P.2d 924; People v. Collins, 80 Cal. App.2d 526, 535, 182 P.2d 585; People v. Smittcamp, 70 Cal.App.2d 741, 745, 161 P. 2d 983.

[6, 7] Appellant next contends that the evidence is insufficient to support the jury's verdict of guilty. We have already given a brief summary of the evidence and are convinced that there was ample evidence to support the verdict. Appellant makes much of the fact that defendant Rogers admitted his guilt and sought to assume sole responsibility for the offenses committed. But the truth or falsity of such testimony of Rogers was a matter for the consideration of the jury and judging from the verdict of the jury, the jury did not believe his testimony that appellant took no part in the commission of the offenses charged.

[8] Appellant next argues that the court erred in not giving a more comprehensive cautionary instruction that the testimony of the victims of the alleged forgery should be carefully scanned where in view of the evidence it was highly probable that different verdicts would otherwise have been returned. We are not aware of any cautionary instruction that the court is required to give in such a case. The jury was fully and fairly instructed on the law applicable to the case.

[9] Appellant makes several other contentions such as that he was forced to trial represented by counsel who were not zealous in his behalf and failed to make timely objections to immaterial evidence; that evidence against him was manufactured; that his counsel refused to subpoena material witnesses favorable to him; that he was forced to trial with an admittedly guilty defendant; that his counsel refused to subpoena handwriting experts to prove his innocence. These contentions or charges find no support in the record and we would not be justified in unduly prolonging this opinion by discussing them in detail. Statements of an appellant which are not supported by the record cannot be considered upon an appeal from the judgment.

In view of the foregoing, we believe that the appellant received a fair and impartial trial, that the evidence supports the judgment of conviction, that no prejudicial error was committed, and that the judgment and order denying appellant's motion for a new trial should be and the same are hereby affirmed.

NOURSE, P. J., and DOOLING, J., concur.

102 Cal.App.2d 857

STINCHCOMB v. PEOPLE et al.

Civ. 18463.

District Court of Appeal, Second District,
Division 1, California.

March 16, 1951.

Gilbert J. Stinchcomb filed application in District Court of Appeal against the People of the State of California, Robert A. Heinze, Warden of the State Prison at Represa, and William H. Davis, official reporter of the Superior Court of Los Angeles County, for a writ of review and order for a bill of exceptions for transcription and a record of trial proceedings taken in connection with a previous application for a writ of error coram nobis. The District Court of Appeal, Per Curiam, held that the application should be denied in view of fact that claim had been previously advanced and rejected because of absence of evidence of change or falsification of record.

Application denied.

See also Cal.App., 228 P.2d 69.

Criminal law 🔑1110(1)

Where application for writ of review and order for bill of exceptions for transcription and a record of trial proceedings in connection with application for writ of error coram nobis was based on theory that record had been changed or falsified but claim had been previously advanced and rejected because of absence of evidence of change or falsification of record, application would be denied.

Gilbert J. Stinchcomb, in pro. per.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., for respondents.

PER CURIAM.

Appellant has filed in this court what he designates as "Notice and Application for a Writ of Review and an Order for a Bill of Exceptions for Transcription and a Trial Record of Trial Proceedings on the Date of October 8th, 1947, in the Superior Court of the State of California, Department 44, County of Los Angeles, California."

An analysis of the documents comprising this notice and application reveals that appellant is thereby seeking to secure an order directing the official reporter to "transcribe from his original notes taken by him on the date of October 8th, 1947, in connection with his application for a writ of error *coram nobis*," which proceeding was the subject of review by this court in People v. Stinchcomb, 92 Cal.App.2d 741, 208 P.2d 396, 399.

In the application now made to this court appellant asserts that he "was denied and deprived of a fair and impartial hearing on appeal of writ of error coram nobis by the conniving and arbitrary illegal judicial procedure employed by the Deputy District Attorney and the Phonographic Reporter, Mr. William H. Davis, to illegally and arbitrarily misleading the Court of Appeals, and the Honorable Justices presiding, thereof, and by trick and devise substituted testimony for the record to produce testimony favorable to the prosecution regarding waiver of trial by jury."

The same claim was advanced by appellant in the case of People v. Stinchcomb, supra, and in ruling thereon this court said: "The defendant asserts that the transcripts of the proceedings in all of the courts which have heard his matters have been rigged and falsified by the reporters and attorneys for the people. These transcripts were made by official reporters, sworn to do their duty, and this court finds no evidence of any changing or falsification of the record."

The defendant's request to file his application *in forma pauperis* is granted, and for the foregoing reasons the application is denied.

GUERRA et al. v. BROOKS.

Civ. 4090.

District Court of Appeal, Fourth District. California.

March 16, 1951.

Hearing Granted May 14, 1951. *

Miguel Guerra, an individual, and Samuel Guerra, a minor, by his guardian ad litem, Miguel Guerra, sued Ernie Lee Brooks to recover for personal injuries sustained by Samuel Guerra when his motorcycle was struck by defendant's automobile. The Superior Court, Kern County, Warren Stockton, J., rendered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Griffin, J., held that the trial court had committed prejudicial error in refusing to permit plaintiff to offer evidence that the highway district where the accident occurred had not been sign-posted and in refusing to give plaintiff's proffered instructions in reference to requirements of law as to sign-posting restricted speed districts.

Reversed.

1. Automobiles 🔑11, 245(41)

Before an area may be considered a speed restricted district, area must both be posted and have required number of buildings, and when nature of district is in dispute, question is one of fact. Vehicle Code, §§ 89, 465, 466, 468, 468.1, 510, 511, 758, 759.

2. Automobiles 🔑11

Vehicle Code section requiring that appropriate signs be erected in restricted speed zones is binding obligation upon state, enacted with view to easing burden of motoring public from strain of determining business or residential district by exact measurement without aid of speed restriction signs. Vehicle Code, § 468.

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* Subsequent opinion 236 P.2d 807.

3. Appeal and error ⚷1056(1), 1067
Automobiles ⚷243(7), 246(56)

In personal injury action brought by motorcycle driver against driver of automobile which collided with plaintiff's motorcycle as automobile was making left turn off state highway, trial court committed prejudicial error in refusing to permit plaintiff to offer evidence that portion of highway where accident occurred had not been sign-posted as business district and in refusing to give plaintiff's proposed instructions in reference thereto where under facts and law submitted to it jury could have believed permissible speed was that of restricted zone and that plaintiff had been violating law in exceeding that speed limit, when in truth and in fact higher speed limit might have been established for that district. Vehicle Code, §§ 89, 465, 466, 468, 468.1, 510, 511, 758, 759.

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Werdel & DiGiorgio, Bakersfield, for appellants.

Johnston, Baker & Palmer, Bakersfield, for respondents.

GRIFFIN, Justice.

Samuel Guerra, aged 20, son of plaintiff Miguel Guerra, was driving a motorcycle easterly on the south half of U. S. Highway No. 466 (Edison Highway) at a point about three miles from Bakersfield and east of the city limits thereof, at about 8:30 p. m. on December 29, 1948. Defendant was driving a Ford car in a westerly direction on the north half of the highway. A railway track runs parallel with the highway on the north. On the south side of it is a built-up section in which is located "Andrews' Market", which faces the roadway. U. S. Highway 466 is intersected by Mt. Vernon Street about 500 feet west of the market and by Oswold Street about 1½ miles east of it.

Defendant testified that as he approached the market it was his intention to turn to his left to stop there for some groceries; that although it was a dark, misty night, he could see by the aid of his lights and the lights reflected from the store for a distance of about 250–300 feet down the road; that as he approached the market he was proceeding about 25 miles per hour; that he rolled down the glass in his left-hand door and made a left turn hand signal for about 150 feet; that he looked up the highway and there were no cars or car lights approaching in front of him; that when he was satisfied that there was no one in his pathway or behind him to create a hazard, he slowed his car to five miles per hour and turned it to the left; that when partially across the center line he, for the first time, saw the motorcycle; that he observed no lights on it; that it struck his automobile near the radiator and the rider was thrown into the air and landed on the soft shoulder of the south side of the highway; that the rider picked himself up and shut off the motor on his motorcycle.

The wife of defendant, who was riding in the front seat with her small son, testified and corroborated her husband's testimony. She definitely stated she was looking down the highway and saw no light of a vehicle approaching; that after the accident she went around the car and noticed there were no lights burning on the motorcycle; that when the officer arrived he turned the lights on and off again.

Samuel Guerra testified he was traveling in the center of the south lane about 40–45 miles per hour when he saw the lights of a car coming at him from the north side of the road and that the car turned sharply in front of him into the south lane; that the lights of the motorcycle were then on; that he had "flicked" them from low to high a short distance down the highway; that when the lights were changed from high to low it automatically stopped the motor; that his motorcycle hit defendant's car; that he did not observe any signal being made by the driver of the car; that after being thrown to the ground he walked over to the motorcycle, turned off the motor, and "put the parking lights on"; that he had pain in his broken arm, and that he was thereafter taken to the hospital for treatment. Hospital, doctor bills and bills for repair of the motorcycle were received in evidence.

A witness who was proceeding westerly and back of defendant's car at the time, testified that his lights were on the defendant's car; that he saw it make a "gradual" left turn and that he did not see defendant make a left-hand turn signal; that the Ford came to rest with the rear wheels "just over or just in back of the white line"; that he did not see the motorcycle until after the collision.

Another witness testified that about ten minutes after the accident all the light he noticed on the motorcycle was a taillight. Another witness claimed that after the accident he heard the motor running on the motorcycle and in regard to seeing lights on it said: "Yes, if it wasn't them, it was light from the cars that was knocked off, it was still burning, because it was lying down on the ground"; that he just "saw the lights come on" and that he went to care for a gas customer.

A highway patrolman who arrived soon after the accident testified that he could not say whether the lights were on or off of the motorcycle when he arrived.

Another witness claims she heard the impact, saw the motorcycle lying on its side with the motor running and that the lights were on; that the owner went over and turned off the motor and the "big" lights and the "little one" came on.

The jury returned a verdict for defendant, who not only denied negligence on his part but pleaded contributory negligence of plaintiff. As may be noted from the evidence there was a question as to whether the lights were sufficiently illuminated on the motorcycle just prior to the accident and a question as to whether defendant made a left-hand turn signal which was visible to plaintiff if he had looked. There probably was a sufficient showing of facts, if believed by the jury, warranting a finding of negligence on the part of defendant and of contributory negligence on the part of the plaintiff in respect to this portion of the evidence.

A more serious question arises as to the refusal of the court to receive certain proffered evidence as to certain speed restriction signs and as to certain instructions given or refused on that subject. During the trial the question arose as to whether the highway, at the scene of the collision, was or was not in a so-called "business district", whether such highway was or was not sign-posted, as required by section 468 of the Vehicle Code, and as to what speed limit should there be applied.

The officer who made the report of the accident designated therein that the district had a permissible 55-mile per hour speed limit. He testified that he did not find a speed reduction sign "anywhere on that highway in that vicinity" but that he did not observe as far east as Oswold Street. Defendant produced a witness who had prepared a plat showing the places of business on the south side of Edison Highway easterly and westerly of the "Andrews' Market" as of December 28, 1948, and testified that more than 50 per cent of that district was occupied by business structures. This evidence was offered for the apparent purpose of showing that the prima facie speed limit at that point was 25 miles per hour.

During plaintiff's case, he offered to prove that about one mile east of this area there was a sign erected on the north side of the highway, visible to persons traveling in a westerly direction reading: "End of 25 mile zone" and that there were no other signs restricting the speed limit until approximately 2½ miles past the area of the accident at a point on the north side of the highway there was a regular speed restriction sign of "25 miles" facing east, and that accordingly the district in between those two signs was a 55 mile per hour district or zone. In support of the offer he cited Noble v. Kertz & Son Feed, etc., Co., 72 Cal.App.2d 153, 164 P.2d 257; and McGough v. Hendrickson, 58 Cal.App.2d 60, 65, 136 P.2d 110.

In this connection it is argued that the rejection of this evidence and the failure to give plaintiff's instruction in the language of sec. 468 of the Vehicle Code withdrew from the jury the basic facts upon which it could properly determine the question of the speed limit allowed in that district; that before an area may be considered a speed restricted district it must be *both posted* and have the *required number of buildings;* that defendant failed to show that such district was "posted" for a restricted speed limit, and accordingly the jury was not properly instructed in reference to the speed allowed; and that under the evidence and instructions given, the jury might well have concluded that plaintiff was guilty of contributory negligence by exceeding the speed limit of 25 miles per hour at the time.

Section 89 of the Vehicle Code, defining a "Business District" was read to the jury. The trial court then gave a speed limit instruction in the language of sections 510 and 511 of the Vehicle Code, i. e., that the prima facie speed limits are "(b) Twenty-five miles per hour" in any business or residential district; "(c) Fifty-five miles per hour under all other conditions unless a different speed is established as provided" in the code and "signs are in place giving notice thereof". No instruction was given as to the requirements of the Vehicle Code pertaining to the erection and maintenance of limited or permissible speed signs.

Plaintiff offered instructions in the language of sections 465, 466, 468, 468.1, and 759 of the Vehicle Code pertaining to the erection of such signs, and offered a general instruction that there is a legal presumption that no road is deemed to be within a "business or residence district" unless it appears first, that there is within the district the required density of structures, and second, that the district is sign-posted "at the boundary lines thereof"; that this presumption is, however, rebuttable. These proffered instructions were refused.

[1] Plaintiff's complaint seems to be well grounded in respect to the ruling of the court sustaining the objection to the offer of proof, and its refusal to give the proffered instructions. Noble v. Kertz & Son Feed, etc., Co., supra, definitely holds that an area must be both posted and have the required number of buildings to be a "residential district" within Vehicle Code section 511, and that when the nature of a district is in dispute, the question is one of fact. See, also, Cavalli v. Luckett, 40 Cal.App.2d 250, 104 P.2d 708.

[2] It is defendant's argument that the cases upon which plaintiff relies were decided before the amendment of section 758 of the Vehicle Code in 1947, Stats.1947, p. 2767, chap. 1256, and accordingly this amendment and the amendment of section 468 in the same year, changed the rule there announced. By the amendments to these sections no change in the principle set forth in the cited cases is indicated in reference to a "State Highway". Section 468, requiring that appropriate signs be erected, is a binding obligation upon the State, enacted undoubtedly with a view to easing the burden of the motoring public from the strain of determining a business or residential district by exact measurement without the aid of speed restriction signs.

[3] The jury was, therefore, not in possession of all of the surrounding facts nor was it fully instructed as to the law pertaining to the permissible speed limit at the place here involved. It might be well said that, under the facts and law submitted to it, the jury believed the permissible speed was 25 miles per hour and that plaintiff, as contended by defendant, was violating the law in exceeding that speed limit and that such violation constituted negligence contributing proximately to the cause of his injuries, when in truth and in fact, the prima facie speed limit might have been established as 55 miles per hour for that district.

Since the trial court refused to permit plaintiff to offer evidence on this subject, and since its failure to give the proffered instructions in reference thereto was error, which we conclude was prejudicial under the facts related, and since the evidence as to contributory negligence of plaintiff in respect to proper lights not being maintained on plaintiff's motorcycle at the time was somewhat unsatisfactory, we conclude that plaintiff's motion for a new trial should have been granted.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

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102 Cal.App.2d 827

SAMUELS v. L. A. MATTRESS CO.

Civ. 17830.

District Court of Appeal, Second District, Division 3, California.

March 14, 1951.

Rehearing Denied April 3, 1951.

Rube F. Samuels brought action against L. A. Mattress Co., and A. V. Hamilton, doing business under firm name and style of Los Angeles Mattress and Renovating Co., for damages for breach of oral contract to purchase 50 bales of cotton linters. The Superior Court, Los Angeles county, J. O. Moncur, J., rendered judgment for plaintiff, and the last named defendant appealed. The District Court of Appeal, Bartlett, Judge Pro Tem., held that finding that oral contract of sale was executed, was supported by substantial evidence.

Judgment affirmed.

1. Sales 🔑383

Finding that oral contract for sale of cotton linters was executed, was supported by substantial evidence, in seller's action for breach of contract.

2. Sales 🔑383

Where buyer did not sign confirmation of oral contract for sale of cotton linters, but evidence showed that terms of contract had been orally agreed upon, that seller had attempted to comply with contract, and that buyer confirmed contract, trial court was not bound to draw inference that seller did not consider himself bound unless buyer signed confirmation.

3. Appeal and error 🔑931(1)

Where there is substantial evidence to support a finding, all conflicts must be resolved in favor of the finding, and all legitimate inferences to support finding must be indulged.

4. Frauds, statute of 🔑90(4)

Where preponderance of evidence supported findings that buyer accepted delivery of five bales of cotton linters, and that such was part performance of oral contract to buy 50 bales of cotton linters for price exceeding $500, oral contract was enforceable because part performance satisfied statute of frauds. Civ.Code, § 1724, subd. 1.

5. Sales 🔑62

Contract for sale of 50 bales of cotton linters to be delivered during two successive months was entire and not severable.

6. Sales 🔑107

Where buyer under oral contract for sale of 50 bales of cotton linters to be delivered in two successive months would not accept delivery on agreed dates and repeatedly put off acceptance of delivery thereafter, but seller still considered contract in force, contract was first breached when seller subsequently gave notice that he would sell cotton linters and hold buyer for loss unless buyer accepted delivery, and buyer would not accept goods, and thereby repudiated the contract.

7. Sales 🔑384(2)

Where oral contract for sale of 50 bales of cotton linters was breached, proper measure of damages was difference between market value as of date of execution of contract and market value at date of breach.

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Newby, Holder & Newby, Los Angeles, for appellant.

Holbrook & Tarr, Leslie R. Tarr and Freda B. Walbrecht, all of Los Angeles, for respondent.

BARTLETT, Justice pro tem.

The plaintiff, a cotton broker, brought this action against A. V. Hamilton, doing business under the firm name and style of Los Angeles Mattress and Renovating

Company, for damages for the breach of an oral contract to purchase 50 bales of cotton linters at a price of 17¼ cents per linter of which 5 bales were delivered. The court rendered judgment in favor of the plaintiff, the respondent here, for $2,041.81 from which the defendant has appealed.

[1–3] Appellant contends that there was no contract to buy and sell cotton in this case and attacks the finding of the court that there was, as not being sustained by the evidence. There was a decided conflict in the testimony but there is substantial evidence to support the court's finding. In his argument on the matter appellant calls attention to the fact that the day following the conversation respondent sent to appellant confirmation of the conversation had with him, in duplicate, signed by the appellant which had printed on it "Please sign pink copy and return at once" but that appellant neither signed it nor returned it. Appellant testified that it was his intention to have Hamilton sign the paper and return it. Appellant says in his brief: "From this testimony it is conclusive that Samuels did not consider himself bound to any agreement whatsoever unless Hamilton complied with his request." Inasmuch as the terms of the contract had been definitely agreed upon orally the day before and Samuels testified to his many subsequent efforts to comply with the contract and that thereafter appellant again confirmed it, the court was bound to draw no such inference. It is our duty where there is substantial evidence to support the finding, not only to resolve all conflicts in favor of the finding, but to indulge in all legitimate inferences which may support it. Estate of Bristol, 23 Cal. 2d 221, 143 P.2d 689.

[4] Appellants next contention is that the contract is invalid under the provisions of subdivision 1 of section 1724 of the Civil Code which provides that the sale of goods of the value of $500 or more shall not be enforceable unless the buyer shall accept part of the goods so contracted to be sold and actually receive the same. The court found: "[t]hat it is true that on or about July 28, 1947, defendant took delivery of 5 bales of cotton linters and paid therefor the sum of $462.30, said 5 bales weighing approximately 2,680 pounds." The court further found: "[t]hat said delivery of said 5 bales of cotton linters was made and taken as part performance of said contract for the purchase of said 50 bales of cotton linters." These findings showed a clear compliance with the provisions of the code section just quoted and were supported by a preponderance of the evidence.

[5–7] Appellant's final contention is that assuming there was an enforceable contract, the plaintiff was not damaged. Under the terms of the original contract some of the linters were to be delivered as follows: 25 bales in January, 1947, and 25 bales in February, 1947. No cotton linters were delivered until in July, 1947, when appellant accepted delivery of 5 bales of linters of the 50 bales of linters contracted for and paid for them at the contract price. Taking the conflicting evidence in the light most favorable to the respondent as we should, shortly after the contract was entered into the respondent began requesting appellant to accept at least a portion of the bales of linters contracted for. On at least six different occasions before the acceptance of the 5 bales by appellant in July, respondent requested appellant to accept delivery but on each occasion he was put off with excuses that appellant did not at that time have the money to buy, that he had no room to store them and the like. On the fifth occasion, May 15, 1947, after making one of his usual excuses, the respondent said: "As far as I am concerned, the contract is still in order." Finally as the court found, appellant notified defendant that unless he accepted the remaining 45 bales he would be obliged to dispose of them and hold appellant for the loss sustained which he did on December 12, 1947. The court then found that the difference in the market value on December 12, 1947 and December 3, 1946, amounted to $2,041.81. Appellant contends that the damages should have been fixed as of the market value of the cotton linters in January and February of 1947 and that if it had been so taken, respondent would have suffered no damage. However, contracts of this type are entire, not severable. Carstens Packing Co. v. Miller, 10 Cal.App.2d 48, 51 P.2d 161. Appellant cites only one case, that of Rice v. Schmid, 18 Cal.2d 382, 115 P.2d 498, 138 A.L.R. 589, and quotes the following language found on page 388 of 18 Cal.2d, on page 500 of 115 P.2d: "Under Civil Code, section 1784, plaintiff is entitled to recover the difference between the contract price and the market price at the time when the goods should have been accepted." Immediately following this quotation is the following which appellant does not quote, 18 Cal.2d page 388, 115 P.2d page 500: "The contract by its terms was automatically extended despite the defendants' failure to give further shipping instructions, and since there was no repudiation of the contract by them, their obligation to accept the goods continued until the plaintiff exercised his option to terminate the contract. Therefore, the damages should be the difference between the contract price and the market price on the date of final termination of the contract. Cf. Fitchburg Yarn Co. v. Hope Webbing Co., 46 R.I. 290, 127 A. 148." Under the facts that we have set forth, we agree with the trial court that the breach of the contract took place on December 12, 1947, when respondent gave the notice to appellant which we have related and appellant repudiated the contract by not accepting the goods. It was the market price of the goods at this date of the breach of the contract which was the proper measure of damages and that is exactly the measure of damages which the court used. The facts and reasoning of the court in the following quotation are applicable here: "There is nothing in the final point made by appellant, that the court erred in holding and concluding that the breach, if any, on the part of appellant occurred on June 20. In support of this claim, it is asserted that this date was thirty-eight days after the making of the oral argeement and eight days after the thirty-day period which the court found was the term of the contract; and further, that appellant was under no obligation to take the cattle, except in installments as they become 'fat', and that the 'time or times when the goods ought to have been accepted' must be looked to for the purpose of determining the measure of damages for the buyer's breach. Without question, the contract was entire. Norrington v. Wright, 115 U.S. 188, 6 S.Ct. 12, 29 L.Ed. 366. The provisions as to shipping the cattle in different weeks and at different times and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries. It was only when the repudiation by appellant took the form it did on June 20, that the breach occurred. Respondent was, therefore, clearly entitled to recover the difference between the contract price and the market price of the cattle remaining undelivered on June 20, the date of the breach." Platt v. Union Packing Co., 32 Cal.App.2d 329, 336, 337, 89 P.2d 662, 666.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

In re HAROOTENIAN'S ESTATE.

Civ. 4062.

District Court of Appeal, Fourth District, California.

March 14, 1951.

Hearing Granted May 10, 1951.*

Proceedings in the matter of the estate of Kazar Harootenian, deceased. Jean Harootenian, also known as Jean Harrison, filed a petition for revocation of the probate of the will on behalf of her son, Haig Harootenian, also known as Haig Harrison, as guardian ad litem. Judgment was entered dismissing the petition, there was no appeal from such judgment and it became final. Jean Harootenian, also known as Jean Harrison, wife of George Harootenian, also known as George Harrison, filed a complaint in intervention for contest of will. The demurrer to her complaint was sustained. She filed an amended complaint, and Syble Janigian and Samuel A. Harootenian, and George Harootenian, also known as George Harrison, and Agnes Philliposian, interposed general and special demurrers to the amended complaint and moved for dismissal. The Superior Court, Fresno County, Ernest Klette, J., entered an order dismissing the complaint in intervention, sustained a demurrer to the amended complaint, and Jean Harootenian, also known as Jean Harrison, appealed. The District Court of Appeal, Mussell, J., held that appellant was an interested person within statute allowing such a person to contest a will.

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* Subsequent opinion 238 P.2d 992.

Order reversed.

1. Wills ⚷229

Right of an heir or other person in interest to contest a will is fundamentally based upon an illegal deprivation occasioned to him, or illegal loss to him of property or property rights, by giving recognition to an instrument depriving him of those rights, which instrument for one or another cause, is illegal, invalid, and void. Probate Code, §§ 370, 380.

2. Wills ⚷229

Only an interested person may contest a will, either before or after probate. Probate Code, §§ 370, 380.

3. Wills ⚷229

Wife of one of testator's sons, who levied upon his interest in his father's will, pursuant to writ of execution based upon separate maintenance decree, had such an interest as might be impaired or defeated by probate of will or benefited by setting it aside, at least as matter of pleading, and was an "interested person" within statute allowing will contest by interested person, notwithstanding that husband had been expressly disinherited and was named only as executor. Code Civ.Proc. § 561; Probate Code, §§ 370, 380.

See publication Words and Phrases, for other judicial constructions and definitions of "Interested Person".

4. Wills ⚷268

Where mother, as son's guardian ad litem, filed petition for contest of will on November 10, 1947, and on April 5, 1949, son's will contest action went to trial, and was dismissed, and there was no appeal and judgment became final, but on March 29, 1949, mother had filed a complaint in intervention for contest of the will which was subsequently amended, since original complaint in intervention was filed within statutory period, dismissal of petition which mother had filed as guardian ad litem did not divest court of jurisdiction to determine issues raised by mother's amended complaint in intervention. Code Civ.Proc. § 561; Probate Code, §§ 370, 380.

5. Wills ⚷261

Where mother, as her son's guardian ad litem, filed petition for contest on November 10, 1947, of father-in-law's will admitted to probate on May 12, 1947, and on April 5, 1949, her son's contest went to trial, and was dismissed, and judgment became final, mother was not guilty of laches by filing her own petition for contest on March 29, 1949, and a subsequent amended complaint on June 8, 1949, and dismissal of mother's complaint in intervention for unreasonable delay was error. Code Civ.Proc. § 561; Probate Code, §§ 370, 380.

6. Equity ⚷71(1)

Equitable doctrine of laches is not involved merely because of a lapse of time, but there must be a showing first of a neglect or omission to assert a right and subsequently of a consequential passage of time which has caused such prejudice to an adverse party that equity will bar assertion of right.

7. Equity ⚷72(1)

While ordinarily laches is a fact to be determined by the court from the evidence, the plea must fail where no damages are proved to have been suffered by the pleader.

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Philander Brooks Beadle, San Francisco, Morton L. Silvers, San Francisco, for appellant.

Leon A. Blum, San Francisco, David E. Peckinpah and L. N. Barber, Fresno, for respondents.

MUSSELL, Justice.

Kazar Harootenian died on March 3, 1947, and his will was admitted to probate on May 12th of that year. Decedent's surviving heirs were his four children, George Harootenian, Agnes Philliposian, Syble Janigian and Samuel A. Harootenian.

The will bequeathed $1,500 to Samuel Harootenian and the residue of the estate to Agnes Philliposian. Syble Janigian and George Harootenian were expressly disinherited, however, George Harootenian was named as executor.

On November 10, 1947, appellant filed a petition for revocation of the probate of the will on behalf of her son, Haig Harootenian, as guardian ad litem. The petition for contest alleged, among other things, that the contestant was a legatee under a prior will; that the signature of the decedent to the will was procured by undue influence; and that the decedent at the time was physically and mentally ill.

On March 28, 1949, appellant, Jean Harootenian, the wife of George Harootenian, levied, under the provisions of Code Civ.Proc. section 561, upon the interest of George Harootenian in decedent's estate. The levy was made pursuant to a writ of execution based upon a separate maintenance decree. On the same day, the probate court made its order authorizing Jean Harootenian to file a complaint in intervention for contest of the will and the complaint was filed pursuant to the order on the following day. It was alleged therein, among other things, that the purported will was prepared and obtained by George Harootenian and Agnes Philliposian with the intent to defraud appellant and for the purpose of preventing her from satisfying the judgment then held by her against George Harootenian; that George Harootenian apparently was without assets and judgment proof; that George Harootenian is a party beneficially interested under said will in that George Harootenian and Agnes Philliposian did, prior to the purported execution of said will, secretly agree that Agnes Philliposian would secretly hold the share of said George Harootenian in and to said estate, in trust, for the use and benefit of the said George Harootenian; that appellant was a person interested in the estate and a judgment creditor of George Harootenian; that the purported will was not duly executed; that the decedent was not of sound and disposing mind and that his signature to the will was procured by undue influence of George Harootenian and Agnes Philliposian.

On April 5, 1949, the contest of Haig Harootenian went to trial upon the issue of the right of the contestant to maintain the contest as "an interested person" within the meaning of section 380 of the Probate Code. The issue was determined against the contestant, Haig Harootenian and on April 16, 1949, the court entered its judgment dismissing the petition of Haig Harootenian. There was no appeal from this judgment and it became final. However, the judgment did not dispose of the complaint in intervention, filed by appellant in said action.

On June 8, 1949, the demurrer to appellant's complaint in intervention was sustained and on August 8th of that year, she filed an amended complaint, setting forth substantially the same grounds as alleged in her first complaint. Respondents interposed a general and special demurrer to the amended complaint and a motion for dismissal. The grounds stated in the demurrer are, in part, that the amended complaint in intervention did not state facts sufficient to constitute a cause of intervention in the will contest and that the intervention was barred by the provisions of section 380 of the Probate Code and by laches. The grounds relied upon for dismissal were that there was no contest pending and that the original complaint in intervention was not filed within the time provided by section 380 of the Probate Code. After a hearing, the demurrer was sustained and the motion granted. Whereupon, the order and judgment appealed from was entered.

The first question presented is whether appellant, as a judgment creditor of George Harootenian, is an "interested person" within the meaning of section 380 of the Probate Code.

Our attention has not been directed to any California authority on the subject. However, the cases from other jurisdictions on the subject are discussed at length in the annotation found in 46 A.L.R. 1490, and in a later annotation in 128 A.L.R. 963. The weight of authority is apparently to the effect that a judgment creditor of an heir is an "interested person" and may contest the will.

[1] In Estate of Baker, 170 Cal. 578, at pages 585 and 586, 150 P. 989, it was stated that the right of an heir or other person in interest to contest a will is fundamentally based upon the illegal deprivation occasioned to him, the illegal loss to him of property or property rights, by giving recognition to an instrument depriving him of those rights, which instrument for one or another cause, is illegal, invalid, and void; that the contest of a will goes to establish upon the part of the contestant that his right to property has been violated.

In Estate of Bily, 96 Cal.App.2d 333, 334–335, 215 P.2d 78, 79, the following language appears: "If it is made 'to appear that a person has such an interest as may be impaired or defeated by the probate of the will, or benefited by setting it aside, he is a person interested.' Estate of Land, 166 Cal. 538, 543, 137 P. 246, 248. 'Any person interested' means any person 'having a direct pecuniary interest affected by the probate of the will.' Selden v. Illinois Trust & Savings Bank, 239 Ill. 67, 87 N.E. 860, 862, 130 Am.St.Rep. 180, quoted with approval in Estate of Land, supra. The phrase means a person having such a 'pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will, or be benefited by setting aside the will.' Bloor v. Platt, 78 Ohio St. 46, 84 N.E. 604, 605, 14 Ann.Cas. 332, quoted with approval in Estate of Land, supra. The interest must be one in the estate that may be impaired or defeated by the will assailed. Estate of Plaut, 27 Cal.2d 424, 425, 164 P. 2d 765, 162 A.L.R. 837; Estate of Anthony, 127 Cal.App. 186, 189, 15 P.2d 531; Estate of Carr, 82 Cal.App.2d 780, 783, 187 P.2d 912; cf., Marculescu v. City Planning Comm., 7 Cal.App.2d 371, 374, 46 P. 2d 308."

[2] And in Estate of Plaut, 27 Cal.2d 424, 425, 164 P.2d 765, 766, 162 A.L.R. 837, it was held that "Only an interested person may contest a will, either before or after probate. Probate Code, §§ 370, 380."

[3] We conclude that appellant had "such an interest" as might be impaired or defeated by the probate of the will involved, or benefited by setting it aside, at least as a matter of pleading.

Respondents argue that since the complaint in intervention was not filed within the time limited by section 380 of the Probate Code, the intervention was dependent upon the principal contest and could not be maintained after that contest was dismissed for want of legal authority of the contestant to contest the will. However, as noted, the contest of Haig Harootenian was dismissed as to him only and the issues presented by the complaint in intervention, which was then on file, were not adjudicated.

In Voyce v. Superior Court, 20 Cal.2d 479, 486, 127 P.2d 536, it was held that the right to file a petition in intervention under the circumstances there present was not barred by reason of the fact that it was not filed within six months after probate. In that case an original contest was initiated within the statutory period. More than nine months after the statutory period had expired, a petition in intervention was filed on the same grounds as the original contest. As in the case at bar, the latter proceeding was then still pending. Two days later the original contestant voluntarily dismissed her contest. The court held that such dismissal could not deprive the intervenors of the right to have the contest heard and determined since the court did not lose jurisdiction by the dismissal and it stated, 20 Cal.2d at page 485, 127 P.2d at page 540: "We believe that it is equally clear that an interested person as mentioned in section 380 of the Probate Code may intervene in a will contest initiated by another interested person within six months after probate, even though the intervention is filed after the expiration of the six months' period."

In Estate of Butzow, 21 Cal.App.2d 96, 98, 68 P.2d 374, it is stated that a contest filed within the statutory time enures to the benefit of an interested party who intervenes after the statutory period, and that the statute of limitations is not a defense to such a petition.

[4] Under the rules announced in the foregoing decisions and the circumstances presented by the record, we conclude that the appellant is an "interested person" within the meaning of Probate Code section 380 and that since the original complaint in intervention was filed within the statutory period, a subsequent dismissal of the original petition as to the contestant Haig Harootenian did not divest the court of jurisdiction to determine the issues raised by appellant's amended complaint in intervention.

[5–7] Finally, it is contended by the respondents that the court was justified in sustaining the demurrer and dismissing the complaint in intervention for unreasonable delay. However, we do not think that it can be said, as a matter of law, that the intervenor was guilty of laches under the circumstances here shown. The equitable doctrine of laches is not involved merely because of a lapse of time. There must be a showing first of a neglect or omission to assert a right and subsequently of a consequential passage of time which has caused such prejudice to an adverse party that equity will bar the assertion of the right. 10 Cal.Jur. 520; Cahill v. Superior Court, 145 Cal. 42, 48, 78 P. 467. While, ordinarily, laches is a fact to be determined by the court from the evidence, the plea must fail where no damages are proved to have been suffered by the pleader. Los Angeles Brick & Clay Products Co. v. City of Los Angeles, 60 Cal.App.2d 478, 488, 141 P.2d 46.

As was said in Thornton v. Middletown Education Corp., 21 Cal.App.2d 707, 711, 70 P.2d 234, 236:

"There being no change affecting the legal rights of the parties, the plea of laches has no foundation. In order that such plea may be obtained it is necessary that the record show a financial loss which has been occasioned by the lapse of time. The lapse of time in this case, alone, is not sufficient to bar the action.

"The defendants not having been prejudiced in any particular by failure of either the grantors or of the plaintiff to institute this action earlier, the plea of laches, we may state again, has no foundation."

We conclude that as against a general demurrer the amended complaint in intervention stated a cause of action and that the trial court erred in sustaining the demurrer and dismissing appellant's complaint in intervention. The order appealed from is reversed.

GRIFFIN, Acting P. J., concur.

102 Cal.App.2d 894

MUSE v. MUSE.

Civ. 18100.

District Court of Appeal, Second District,
Division 2, California.

March 19, 1951.

Mary Martha Muse brought a proceedings on an order to show cause seeking a modification of the support order, entered in a divorce action, requiring Harry L. Muse II to pay $30 a month for the support of the minor child of the parties. The Superior Court, Los Angeles County, Kurtz Kauffman, J., denied the application, and plaintiff appealed. The District Court of Appeal, Wilson, J., held that it did not appear from the evidence that the father had the present ability to pay more than he was currently contributing.

Order affirmed.

1. Divorce 🔑307

Wide discretion rests in trial court in divorce actions with respect to amount to be awarded for child support.

2. Divorce 🔑309

In proceedings on order to show cause brought by divorced wife seeking modification of support order, evidence sustained trial court's finding that father had not the present ability to pay more than he was presently contributing.

Mark F. Jones, Jr., Los Angeles, for appellant.

No appearance for respondent.

WILSON, Justice.

From an order denying her application for an increase in the amount awarded her for child support, plaintiff appeals.

The sole question for determination is whether the trial court abused its discretion in refusing to grant the increase.

In the divorce action between the parties plaintiff was given custody of the minor child and defendant was ordered to pay $30 a month for his support. By this proceeding, on an order to show cause, plaintiff seeks a modification of the support order from $30 to $75 a month.

Plaintiff testified that the child has suffered from paralysis since birth and requires braces; that the braces are hard on his clothes and he needs new shoes every month; that her only income is the $30 a month paid by defendant. It is her contention that since defendant's income is $350 a month, in addition to which "he would normally be receiving an additional income of $37.50 per month as rental," the $30 a month awarded for the support of his first child is "unreasonably disproportionate to the amount allowed for the support of the four members of the second family."

Defendant has remarried and has two children of the second marriage. He testified that he was making monthly payments to a bank on loans for furniture, dental bills and a airplane loan which was incurred prior to his second marriage, the total of such payments being $39; that his living expenses for his present wife and their two children together with the $30 which he contributes to the support of his first child amount to within $4 of his monthly income with no allowance being made for clothing; that he was also carrying a $10,000 insurance policy, of which his first child was the beneficiary, at a cost of $6.70 a month; that his chicken business was not making money but was losing a little; that a friend of his who normally lived with him contributed $37.50 toward the rent when he was residing with him but that he was at the present time in New York for an indefinite period.

[1, 2] A wide discretion rests in the trial court with respect to the amount to be awarded for child support. Conceding that the child is in need of additional funds it does not appear from the evidence that the father has the present ability to pay much if any more than he is currently contributing.

Order affirmed.

MOORE, P. J., and McCOMB, J., concur.

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102 Cal.App.2d 774

In re ZAEPFEL'S ESTATE.

JONES v. SECURITY FIRST NAT. BANK.

Civ. 18152.

District Court of Appeal, Second District,
Division 1, California.

March 12, 1951.

Hearing Denied May 10, 1951.

Proceeding in the matter of the estate of Helen M. Zaepfel, deceased, wherein Sylvia Jones petitioned for a determination of heirship, naming the Security First National Bank, executor, and the Roman Catholic Archbishop of Los Angeles, legatee, as respondents. The Superior Court, Los Angeles County, Newcomb Condee, J., held that the petitioner had been neither a spouse, brother, sister, nephew, niece, descendant or ancestor entitled under the will or the law of succession to take the property bequeathed or devised in the will, and held that a gift under the will to the Roman Catholic Church of St. Helen was valid and that such beneficiary was entitled to succeed to the entire estate. From the trial court's determination, the petitioner appealed. The District Court of Appeal, Doran, J., held that since the petitioner, who had once been an adopted daughter of the decedent but in no other way related, had later been adopted in another state by her grandmother, the trial court's determination must be sustained.

Affirmed.

1. Adoption ⟹21, 25

In proceeding brought by alleged adopted daughter of testatrix to contest right of church, named as sole beneficiary, to succeed to entire estate, status of alleged adopted child would be determined by laws of state where adoption was effected, but rules of inheritance would be determined by laws of state where real estate was situated, or, in case of personal property, where decedent was domiciled. Probate Code, §§ 41, 257; Domestic Relations Law N.Y. § 115.

2. Adoption ⟹21

In proceeding by alleged adopted daughter of testatrix to contest right of church, named as sole beneficiary, to succeed to entire estate, where it appeared that after petitioner's father married testatrix, testatrix had adopted petitioner under laws of Connecticut, but that five years later petitioner's grandmother had adopted petitioner under laws of New York, and that subsequently, after death of petitioner's father, testatrix had moved to California and died there, trial court properly found that, at time of testatrix's death, petitioner was neither a spouse, brother, sister, nephew, niece, descendant nor ancestor who, under the will or the laws of succession, would be entitled to take the property bequeathed or devised in the will. Probate Code, §§ 41, 257; Domestic Relations Law N.Y. § 115.

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Bailey & Poe, and Rufus Bailey, all of Los Angeles, for appellant.

Hanna & Morton, and John H. Blake, all of Los Angeles, for respondent, Roman Catholic Archbishop of Los Angeles.

DORAN, Justice.

From the stipulation as to facts it appears that petitioner Sylvia Jones was born April 13, 1913 at Norwalk, Connecticut; that thereafter petitioner's father and mother were divorced and the father married the decedent who on May 20, 1920, adopted petitioner under the laws of Connecticut. Petitioner's father, with petitioner and the decedent, then moved to the State of New York where on June 13, 1925 the petitioner's grandmother, Agnes L. Russell, adopted petitioner under the laws of New York. Clarence L. Jones, petitioner's father, died in Syracuse, New York on February 28, 1932; the decedent Helen M. Jones (Zaepfel), widow of petitioner's father, then moved to Los Angeles, California, remarried and died there on November 10, 1948. The will of Helen M. Zaepfel, duly probated, left the entire estate to the Roman Catholic Church of St. Helen, and recited: "I declare that I am a widow; that I have no children; that I have no brothers, sisters, nephews, nieces, descendants or ancestors now living".

The trial court found "That the petitioner, Sylvia Jones, is neither a spouse, brother, sister, nephew, niece, descendant nor ancestor who, under the Will or the laws of succession, is entitled to take the property bequeathed or devised in said Will"; that the gift to the Roman Catholic Church of St. Helen, is valid and that such beneficiary is entitled to succeed to the entire estate.

"It is the position of appellant, both by the weight of authority and reason, that her adoption in the State of New York did not deprive her of the right to inherit from her prior adoptive parent, namely the decedent herein". Appellant notes in this connection that both under the laws of Connecticut where the adoption by decedent occurred, and in California, under Section 257 of the Probate Code, an adopted child inherits from its adoptive parents. Section 115 of the Domestic Relations Law of New York, McK. Unconsol. Laws, C. 14, provides that "the rights of a foster child to inheritance and succession from his natural parents remain unaffected by adoption", from which it is argued that the second adoption (in New York) did not deprive the child's right to inherit from the previous adoptive parent, namely the decedent.

Respondent's position is that "Appellant, who is now the adopted child of a stranger to decedent but who was once an adopted child of the decedent, is not a person entitled, under the laws of California, to succeed to decedent's property. She is neither spouse, brother, sister, nephew, niece, descendant nor ancestor of the decedent and is therefore outside the application of Section 41 of the Probate Code".

The question here presented is apparently one of first impression in this state. Nor has appellant presented any decision of any other state dealing with the exact situation here involved. As hereinafter pointed out, the cases relied upon by appellant rest upon certain propositions clearly untenable in the instant controversy, or upon facts easily distinguishable. Annotations in 73 A.L.R. 964 and 154 A.L.R. 1179 dealing with "Conflict of laws as to adoption as affecting descent and distribution of decedent's estate", indicate a divergence of opinion in reference to such conflict but do not determine the precise question now before the court.

In Re Estate of Tibbetts, 48 Cal.App.2d 177, 119 P.2d 368, cited by appellant, merely holds, in the language of the headnote, that "An adopted child is a lineal descendant of an adopting parent within the meaning of the anti-lapse section of the Probate Code (§ 92), and is entitled to inherit on the death of its parent prior to the death of a testator, where its parent is kindred of the testator and a legatee under his will"; and that the anti-lapse statute applied "irrespective of the existence or terms of a similar statute in the state in which an adopted child claiming the right to inherit under the will resides and was adopted. The adoption statute of such state is material only for the purpose of determining whether such child attained the status of a 'lineal descendant' of the testator by virtue of the adoption".

[1] Although the *status* of an alleged adopted child is to be determined by the laws of the state where the adoption was effected, the rules of inheritance are determined by the laws of the state where real estate is situated, or in the case of personal property where the decedent was domiciled. See, In re Estate of Grace, 88 Cal.App.2d 956, 200 P.2d 189. In the instant case, the laws governing inheritance are those of California where the decedent was domiciled and died.

The provision contained in Section 115 of the New York Domestic Relations Law that "the rights of a foster child to inheritance and succession from his natural parents remains unaffected by adoption", relied upon by appellant, can furnish no support for the present contentions either directly or by analogy. The decedent was, of course, not a natural parent of appellant but merely a stepmother unrelated in blood. Moreover to give any force to such New York statute or cases based on similar statutes, or to draw any analogy therefrom, would be to totally ignore the express provisions of Section 257 of the California Probate Code which provides that "An adopted child *does not* succeed to the estate of a natural parent when the relationship between them has been severed by the adoption". (Italics added.) If the New York adoption did anything, it certainly "severed" the previous adoptive relation with decedent.

Appellant has cited In re Sutton's Estate, 161 Minn. 426, 201 N.W. 925, and Patterson v. Browning, 146 Ind. 160, 44 N.E. 993, holding, in the language of the Sutton case, that since an adoption did not take away the right of a child to inherit from its natural parents (not the law in California), there was "no more reason why a second adoption should take away the right of inheritance conferred by the first adoption". It must be noted that these and other similar cases were decided upon one of two theories. Either the law in the state of adoption permitted an adopted child to inherit from its natural parents; or the second adoption took place after the death of the first adoptive parent and when the child's right to inherit had already vested. Neither of these situations is here present.

Obviously, an entirely different situation would be presented had the second adoption in New York not taken place. But as hereinbefore indicated, the obvious purpose and effect of such second adoption could only have been to substitute the newly created status whereby appellant's grandmother became the guardian, for the previous adoptive parental role which the decedent occupied. That the decedent so understood the matter is made clear by the will statement, "I have no children; * * * no descendants or ancestors now living". Having once thus severed the original adoptive relation between appellant and decedent, it seems neither good law nor good reason to now attempt to restore that relation for the purpose of enabling appellant to inherit from one not otherwise related.

An example of the rule that a foreign law in reference to adoption will be given effect in California in determining adoptive "status" is found in Re Estate of Morris, 56 Cal.App.2d 715, 133 P.2d 452, where a Rhode Island statute permitted adoption of one adult by another although no such procedure is authorized under California law. The Morris case involved a liberal interpretation of the California inheritance tax law, and was in no manner similar to the present controversy. As hereinbefore mentioned, while the "status" may be determined by foreign law, the rules of inheritance are to be determined by the local law.

[2] The trial court's finding, therefore, that the appellant, once an adopted child of the decedent but in no other way related, and later adopted in another state by a grandmother, was at the time of the decedent's death, "neither a spouse, brother, sister, nephew, niece, descendant nor ancestor who, under the will or the laws of succession, is entitled to take the property bequeathed or devised in said Will", must be sustained. Appellant's briefs have presented no persuasive reason and no authority for appellate interference with that ruling.

The order appealed from is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

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103 Cal.App.2d 29

DOUGLAS v. DOUGLAS et al.

Civ. 18247.

District Court of Appeal, Second District, Division 2, California.

March 21, 1951.

Fay H. Douglas brought action against Edwin Samuel Douglas, Edwin S. Douglas, Jr., and others to terminate alleged constructive trust or alleged express trust which arose when Edwin Samuel Douglas transferred property to Edwin S. Douglas, Jr., for alleged purpose of preventing the plaintiff from collecting alimony from Edwin Samuel Douglas. The Superior Court of Los Angeles County, William B. McKesson, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that any rights which plaintiff might have had were barred by three year limitations and by laches.

Judgment affirmed.

1. Limitation of actions 🔑103(4)

If action by wife against husband and his children by former marriage should be considered as an action to terminate a constructive trust with respect to property which husband had transferred to son for alleged purpose of preventing wife from collecting alimony, it was barred by three year limitation, where brought more than three years after transfer of property to son and after wife first acquired knowledge of transfer. Code of Civ.Proc. § 338.

2. Limitation of actions 🔑36(2)

Three year limitation statute applies to all actions to terminate a constructive trust, whether relief demanded be legal or equitable. Code Civ.Proc. § 338.

3. Limitation of actions 🔑103(4)

The three year period of limitation commences to run against a cause of action to terminate a constructive trust as soon as aggrieved party discovers either facts constituting fraud or acquires such knowledge thereof as would put a reasonably prudent person on inquiry. Code Civ. Proc. § 338.

4. Limitation of actions 🔑179(2)

Where fraudulent acts complained of in an action to terminate a constructive trust occurred more than three years prior to filing of action, in order to constitute a valid complaint, not only must facts constituting the fraud be declared but also circumstances surrounding discovery must be so alleged as to disclose that action is not barred by statute of limitations. Code Civ. Proc. § 338.

5. Limitation of actions ⚷103(2)

In controversies over express trusts, cause of action accrues and limitation commences to run on day defendant repudiates the trust.

6. Divorce ⚷276(1)

Where husband sued wife for divorce in April, 1944, and wife filed her cross-complaint in June, 1944 and obtained an award of alimony, and about September, 1944 husband conveyed property to his son by a prior marriage for alleged purpose of preventing wife from collecting alimony, and wife knew of conveyance in 1944, wife was barred by laches when she brought action on May 18, 1950 to terminate alleged express trust under which son allegedly held property for her husband.

7. Limitation of actions ⚷1

The policy of the law is to prevent stale claims from springing up after lapse of long periods of time and pursuant to such policy, statutes of limitations are enacted on presumption that one having a well-founded claim will not delay in enforcing it beyond a reasonable time.

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Harry W. Dudley, Beverly Hills, for appellant.

A. Maxson Smith, Los Angeles, Robert A. Keller, Los Angeles, of counsel, for respondents.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment that she take nothing against defendants entered after the general and special demurrers against her complaint had been sustained without leave to amend.

The allegations of the complaint in substance are: appellant is wife of defendant Edwin Samuel Douglas, Edwin S. Douglas, Jr. and Grace Lorraine Kunkle are his children by a former marriage. April 28, 1944, Edwin Sr. sued appellant for divorce. She filed a cross-complaint and on a hearing of an order to show cause therein, the court ordered Edwin Sr. to pay his wife $250 per month as alimony commencing November 15, 1944, which order has become final. After the 15th of January, 1946, no payment has been made. About September, 1944, Douglas, Sr., transferred to Edwin Jr. certain real and personal property in Los Angeles county and specified realty in San Bernardino county and in Arizona for the purpose of fraudulently depriving Mrs. Douglas of her interest in such properties and to prevent her from collecting the alimony awarded and to be awarded to her. At the time of such transfers Edwin Jr. agreed to hold the properties for the benefit of Douglas Sr. and accepted them for the purpose of defrauding Mrs. Douglas. Defendants claim that none of such properties was ever so held in trust. Both father and son claim that they belong to Edwin, Jr., but such claim is untrue. Douglas, Sr., now resides in New York. There is no other property of Douglas, Sr., than those described. On January 11, 1950, on the petition of defendants other than Douglas, Sr., this court issued its writ prohibiting the superior court from further proceeding with the divorce action on the ground that more than five years had elapsed from the time of filing to the bringing of such action to trial and the judgment is final. As a result of the writ of prohibition, the superior court cannot issue either a writ of execution on the order for alimony or issue an order for supplemental proceedings. The trust alleged has never been repudiated. Plaintiff has no adequate remedy at law.

In her four additional counts plaintiff alleges a constructive trust of realty in Oregon and Washington and attempts to declare express oral trusts with respect to each of the same items of real property and certain movables in California; she combines (count 3) allegations of constructive trusts with respect to three items of personal property with allegations of express oral trusts with respect to each of the same items of personalty. She combines (count

4) allegations of a constructive trust in her favor with respect to a parcel of realty in Riverside county with allegations purporting to establish an express oral trust with reference thereto. In her fifth count she combines all the allegations of the first four causes with allegations of moneys due. Douglas, Sr., not having been served with process, his codefendants demurred specially and generally to all counts.

The court below having sustained the demurrer without leave to amend entered judgment against plaintiff. Since the basis of the ruling is not disclosed by the record, this discussion will proceed upon the hypothesis that appellant has correctly divined that the trial court concluded the complaint to be invalid by virtue of the operation of the statutes of limitations. Prefatory to her argument appellant concedes "that more than three years prior to the commencement of the action appellant learned of said alleged transfers and the alleged creation of the trusts and all parties to the alleged trusts denied to appellant their existence. No allegations were made as to the dates of such discoveries or denials because, under appellant's theory such dates are immaterial."

[1–5] Appellant contends that the statutes of limitations do not bar an action to establish a trust where the transferee of the property holds the mere naked legal title and the trust has not been repudiated as to the beneficiary regardless of (1) the date of transfer and (2) the fact that the transferees deny the existence of a trust. She cites Alhambra Building and Loan Association v. De Celle, 47 Cal.App.2d 409, 118 P.2d 19 and Knapp v. Elliott, 81 Cal.App.2d 667, 184 P.2d 934. Her contention necessitates the observation that the complaint is a double-barrelled effort. It declares first that the transfers were made for the purpose of defrauding appellant. In the next breath she alleges that respondents Edwin, Jr., and Grace Kunkle orally agreed to hold the properties in trust for the benefit of Douglas, Sr., but that both son and father claim that the properties belong to the son. We have therefore, allegations of a constructive trust commingled with allegations of an express oral trust with appellant contending that her complaint is valid while respondents affirm that the demurrer was properly sustained. If the complaint be considered as an action to terminate a constructive trust the general demurrer was properly sustained on the ground that the action was brought more than three years after the fraudulent transfer and after appellant first acquired knowledge thereof. Code Civ.Proc. sec. 338; Unkel v. Robinson, 163 Cal. 648, 650, 126 P. 485; Calkins v. Calkins, 63 Cal.App. 292, 218 P. 611. The three-year limitation applies to all such actions whether the relief demanded be legal or equitable. Knapp v. Knapp, 15 Cal.2d 237, 242, 100 P.2d 759; Lightner Mining Company v. Lane, 161 Cal. 689, 702, 120 P. 771. The period of limitation commences to run as soon as the aggrieved party discovers either the facts constituting the fraud or acquires such knowledge thereof as would put a reasonably prudent person on inquiry. Archer v. Freeman, 124 Cal. 528, 532, 57 P. 474. Where the fraudulent acts complained of occurred more than three years prior to the filing of the action to constitute a valid complaint not only must the facts constituting the fraud be declared but also the circumstances surrounding the discovery must be so alleged as to disclose that the action is not barred by the statute of limitations. Lady Washington Consolidated Company v. Wood, 113 Cal. 482, 487, 45 P. 809. The statute commences to run when the cause of action accrues. Thus, if the trust alleged be deemed one arising from a fraudulent transfer, the complaint is not sufficient for the reason that no excuse is pleaded for the protracted delay in filing the complaint and the demurrer was well taken on that score. In controversies over express trusts the cause of action accrues on the day the defendant repudiates the trust. Lamb v. Lamb, 171 Cal. 577, 153 P. 913.

[6] Looking at the complaint as one to terminate an express trust there are two factors for appraisal. Was the trust written or oral? If it was written, we must first ascertain whether it has ever been repudiated. The trust relied upon by appellant is "an express oral trust." Although the complaint declares the legal conclusion that the trust has never been repudiated,

that allegation is followed by the evidentiary statement that both father and son "claim that none of said properties was or is held in trust; that defendants * * * both claim that said properties are and each of them is the properties of Edwin S. Douglas, Jr." Construing the pleading most strongly against the pleader, the conclusion cannot be obviated that the parties "claim that none of said properties is so held in trust." Since the complaint makes no distinction between the claims of respondents now and in 1944 when she first had knowledge of the transfers, it must be concluded that she knew that at the date of the conveyances father and son claimed the deeds to have been in fee simple and that thereby she learned they repudiated the very idea of a trust. If the alleged trust was repudiated in 1944, by what process of reasoning could the charge of laches on the part of appellant be overcome? Appellant was married to Douglas, Sr., in April 1941, he sued her for divorce in April, 1944, and she filed her cross-complaint in June. Their controversies have been continuous since that time. With such agitation as must perforce have occupied appellant's attention and have reminded her of her alleged rights in properties conveyed by her husband to his son, her failure to proceed with an action to annul the conveyances of the several properties cannot be explained upon any theory consistent with diligence. When she filed this action May 18, 1950 her claim here asserted had become stale. To allow the trial of a claim thus delayed would place a premium upon laches instead of forestalling further effort on the part of a tardy litigant. Conceding, arguendo, the trust to have been created by writings, since appellant had knowledge of the existence of her asserted rights against respondents, a presumption arises that her long delay has resulted in prejudice to them. McGibbon v. Schmidt, 172 Cal. 70, 74, 155 P. 460; Title Insurance and Trust Company v. California Development Company, 171 Cal. 173, 218, 152 P. 542; 10 Cal.Jur., p. 528, sec. 65. The foregoing applies with equal force to the chattels mentioned in the pleading. In fact, by reason of their perishable nature even greater diligence was essential to their preservation than in the case of realty.

But the allegation upon which appellant primarily relies is that the trust created is "an express, oral trust." Her theory is that notwithstanding the conveyances of the properties were made for the purpose of defrauding her still her husband continued to be the beneficial owner of the properties; that only the "mere naked legal title" was conveyed to Edwin, Jr. and Grace. It is true that under our holding in Alhambra Building and Loan Association v. De Celle, 47 Cal.App.2d 409, 412, 118 P.2d 19, a conveyance of land to a grantee who is to hold it in a secret trust for the true owner may be cancelled by a decree in equity when not inhibited by equitable principles. In the Alhambra case Mrs. De Celle owed the plaintiff a judgment in the sum of about $8,000. After the entry of such judgment she purchased a lot and caused title to be placed in the names of her relatives to be held in trust for her. She continued to be the beneficial owner; the grantees held the naked legal title. She continued in actual possession of the transferred property and retained absolute control over it, unlike Douglas Sr., in the instant case. The inference from the complaint herein is that an actual transfer was made rather than a mere secret paper transaction, and accordingly the doctrine of laches is more readily applicable.

[7] Morever, the Alhambra decision indicates that the three-year statute of limitations would have operated to defeat the claim save for the express trust allegation. But there was no discussion of this point although the trial court found that the plaintiff did not learn of the transfer until two weeks before filing the action. Certainly that decision is not authority for the proposition that there is no applicable statute of limitation whatsoever, or that such proceedings may be instituted at any time regardless of delay. The policy of the law is to prevent stale claims from springing up after the lapse of long periods of time and pursuant to this policy, statutes of limitations are enacted on the presumption that one having a well-founded claim will not

delay enforcing it beyond a reasonable time. Barclay v. Blackington, 127 Cal. 189, 196, 59 P. 834.

The instant cause of action "died a-bornin'." Before the complaint was filed appellant had become enmeshed in the knowledge of her rights and her delays in asserting them. To approve of her complaint and allow the presecution of her alleged cause would be to denounce the philosophy of the principle which abhors laches in the prosecution of claims.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

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103 Cal.App.2d 49

DONA v. STATE PERSONNEL BOARD et al.

Civ. 14611.

District Court of Appeal, First District, Division 1, California.

March 22, 1951.

Petition for writ of mandate by Vincent Dona against State Personnel Board of the State of California, and others, to review decision of Personnel Board dismissing petitioner from his probationary appointment as warden with Fish and Game Commission. The Superior Court in and for the City and County of San Francisco, Daniel R. Shoemaker, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that Personnel Board and Trial Court were justified in finding that petitioner did not demonstrate merit, efficiency, fitness and moral responsibility and were justified in concluding that he should be rejected because of the good of the service.

Judgment affirmed.

1. Officers ⚷11.5

Under statute requiring that notice of rejection be served on probationary employee, notice of rejection must be accompanied by a statement of specific reasons therefor and it is not sufficient for appointing power simply to give its conclusions, unsupported by facts. Government Code, § 19173.

2. Officers ⚷11.5

Notice of rejection served on petitioner, who had received a probationary appointment as warden with Fish and Game Commission which charged that petitioner shirked his fair share of duties, slept while on duty, failed to keep appointments, failed to obey orders and instructions, failed to cooperate with forest service, created dissension among other employees and showed no interest in his job and which notice was supported by detailed allegations setting forth places, names and dates complied with statute requiring notice of rejection to be served on probationary employee accompanied by a statement of specific reasons therefor. Government Code, § 19173.

3. Officers ⚷11.5

Action of appointing board in dismissing a probationary employee must be upheld if charges are supported by substantial evidence. Government Code, § 19173.

4. Officers ⚷11.5

In making determination whether probationary employee has exhibited during his probation proper qualifications to become a permanent civil service employee, employer under whose direction and observation he is working is in best position to form a conclusion. Government Code, § 19173.

5. Officers ⚷11.5

The appointing power must necessarily be allowed to exercise discretion and personal judgment in determining whether a probationary employee shall acquire permanent status. Government Code, § 19173.

6. Mandamus ⚷168(4)

On petition for a writ of mandate to review decision of State Personnel Board dismissing and rejecting probationary employee, conflicts in evidence were for trier of facts and conflicts would be resolved against probationary employee. Government Code, § 19173.

7. Mandamus ⚷168(4)

On petition for writ of mandate to review decision of State Personnel Board rejecting and dismissing petitioner from his probationary appointment as warden with Fish and Game Commission, evidence sustained finding that petitioner did not demonstrate merit, efficiency, fitness and moral responsibility and justified Personnel Board and trial court in concluding that petitioner should be rejected because of the good of the service. Government Code, § 19173.

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Chas. N. Douglas, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., Ralph W. Scott, Dep. Atty. Gen., for respondents.

PETERS, Presiding Judge.

Petitioner holds permanent civil service status as an assistant warden with the Fish and Game Commission. He took and passed the examination for the higher position of warden, and received a probationary appointment as warden. On September 16, 1947, well within the probationary period of six months, the appointing power served upon petitioner a notice of rejection and dismissal. Petitioner challenged his dismissal, and a hearing was had before a hearing officer of the State Personnel Board. That board affirmed petitioner's dismissal as warden. Petitioner then applied to the superior court for a writ of mandate to review the decision of the Personnel Board. That court tried the case on the record produced before the board, and found that the notice of rejection served on petitioner complied with the law; that the allegations of the rejection were supported by evidence; and that petitioner was rejected during his probationary period for reasons relating to his qualifications, the good of the service and for his failure to demonstrate merit, efficiency and fitness. Judgment was entered accordingly. Petitioner appeals, contending that the notice of rejection was insufficient, and that the evidence is insufficient to support the facts set forth in the notice. There is no merit in either point.

A notice of rejection must be served upon a probationary employee. Section 19173 of the Government Code as it read on September 16, 1947,[1] provided:

"Any probationer may be rejected by the appointing power during the probationary period for reasons relating to the probationer's qualifications, the good of the service, or failure to demonstrate merit, efficiency, fitness, and moral responsibility.

"Notice of rejection accompanied by a statement of the specific reasons therefor, truthful within the knowledge of the appointing power or other officer or person in charge of the employee, shall be filed by the appointing power with the board and a copy served upon the probationer to give effect to the rejection."

[1,2] The notice of rejection must, under this section, be accompanied "by a statement of the specific reasons therefor". It is not sufficient for the appointing power simply to give its conclusions, unsupported by facts. Thus in Bryant v. State Personnel Board, 96 Cal.App.2d 423, 215 P.2d 512, 513, it was held that a notice of rejection which gave as the "reasons" for the rejection "the good of the service and failure to demonstrate merit and fitness", and which charged the probationary employee with "actions unbecoming an employee" was insufficient as a matter of law. In Brown v. State Personnel Board, 43 Cal.App.2d 70, 110 P.2d 497, the reason given in the notice of rejection was "services unsatisfactory," and this was held to be insufficient. These are the cases relied upon by appellant to support his

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[1] The date the notice of rejection was served on appellant. The section was amended in 1947 (Stats. of 1947, Chap. 1366, § 4, p. 2916), but this amendment did not become effective until September 19, 1947, three days after the notice of rejection was served. In reference to the issue before us, the change effected by the amendment is in form and not in substance. The result would not be affected by the amendment.

contention that the notice of rejection was insufficient as a matter of law. The notice of rejection here involved carefully complies with the requirments of the section. It charges that appellant shirks his fair share of duties, sleeps while on duty, fails to keep appointments, fails to obey orders and instructions, fails to cooperate with the forest service, creates dissension among the other employees, and shows no interest in his job. If the notice contained no more than this it might be insufficient under the rule of the Bryant and Brown cases, supra. But unlike those cases each charge is supported with detailed allegations setting forth places, names and dates. A reading of the notice demonstrates that it complies in all respects with the requirements of section 19173 of the Government Code.

[3] The evidence supports most of the charges. In considering this evidence it must be remembered that appellant is a probationary employee. In such cases the action of the appointing power in dismissing the employee must be upheld if the charges are supported by substantial evidence. Boutwell v. State Board of Equalization, 94 Cal.App.2d 945, 212 P.2d 20. Moreover, the purpose of a probationary appointment, and the rights of the employee, are far different from those of a permanent employee. In Wiles v. State Personnel Board, 19 Cal.2d 344, 347, 121 P.2d 673, 674 the purpose of a probationary period for employees was stated as follows: "The object and purpose of a probationary period is to supplement the work of the civil service examiners in passing on the qualifications and eligibility of the probationer. During such period the appointive power is given the opportunity to observe the conduct and capacity of the probationer, and if, in the opinion of that power, the probationer is not fitted to discharge the duties of the position, then he may be discharged by the summary method provided for in the Civil Service Act before he acquires permanent civil service status. See Neuwald v. Brock, 12 Cal.2d 662, 670, 86 P.2d 1047; Note, 131 A.L.R. 383." In the Boutwell case, supra, the same thought is expressed as follows, 94 Cal. App.2d at page 949, 212 P.2d at page 22: [4, 5] "In making the determination whether the probationer has exhibited during his probation the proper qualifications to become a permanent civil service employee the employer under whose direction and observation he is working is in the best position to form a conclusion. As said by the court in Broyles v. State Personnel Board, 42 Cal.App.2d 303, 307, 108 P.2d 714, 716: 'The appointing power must necessarily be allowed to exercise discretion and personal judgment in determining whether a probationary employee shall acquire permanent status.'"

Tested by these standards the evidence supports the charges made in the notice of rejection and dismissal. The record shows that appellant was assigned on July 18, 1947, to work under Hecker, Captain of Patrol. The Captain testified that on the evening of August 29, 1947, he was on patrol with appellant; that after observing generally the lake area to be patrolled the two sat in an automobile and Hecker told appellant to listen for motors and shots and to look for spotlights; that the two sat down in the car at 8:05 p. m., and at 8:15 p. m. appellant was asleep; that he slept until 10:05 when Hecker awakened him by slamming the door of the car; that in five minutes appellant was again asleep and slept until 10:45 when Hecker started to drive away; that from 8:05 until 10:45 appellant did not speak one word. Philbrick, another warden who worked with appellant, also testified that appellant went to sleep on patrol. He gave specific dates—August 3rd, August 9th and August 6th—when appellant went to sleep, and testified that he objected to working with appellant because he went to sleep on the job, and showed no interest in his job. Lantis, another warden, testified that on August 17, 1947, appellant went to sleep while on patrol, as he did also on August 22nd and again on August 25th. He, too, objected to working with appellant because of his sleeping tendencies, and because petitioner did not do his share of work in an emergency.

There was much evidence that appellant failed to keep appointments with his superior officers and associates. Hecker testified that he had instructed appellant to meet him at Hecker's house on July 20, 1947, at 10 a. m., and that appellant did not arrive until 1 p. m., stating that he had been out riding with a real estate agent; that appellant did not telephone about being delayed; that on August 13, 1947, Hecker instructed appellant to report at Hecker's house at 10 a. m. on the following day, but appellant did not arrive until 7 p. m., stating that he had been patrolling over toward Santa Margarita, although he had been instructed to patrol in another area. Hecker testified that he could only remember two occasions when appellant had been on time. He further testified that on August 3rd he instructed appellant to come to Hecker's house the next morning to get some tools so that certain springs could be dug out; that Dona never did arrive, and at 9:30 p. m. that night Hecker delivered the tools to appellant's house. Appellant told Hecker that he had been horseback riding with his wife that day. Philbrick also testified that appellant was late for appointments, and gave one specific instance—August 5th —when appellant was late.

Another incident appearing in the evidence revolves around appellant shooting a deer in an area closed to the public by the United States Forest Service, the area being in a national forest. State wardens were supposed to cooperate with the forest service and to keep members of the public out of closed areas. The area in question was a mile and a half behind a closed gate to which appellant had a key, it being the duty of state wardens to patrol the area. On August 27th he shot a buck in the closed area. While the killing of the deer was not illegal under state law, it was the duty of state wardens to warn hunters not to enter areas closed to recreational use by the forest service, and it was a violation of the national forest service policy. Wardens also had been instructed by a circular letter mailed to each warden to deposit at the ranger's station duplicate deer tags for animals killed in a national forest. It was also against the policy of the Fish and Game Commission for wardens to validate their own deer tags. Appellant violated all of these regulations, and, in addition, lied to his superior officer about doing so. He not only killed the deer in the closed area, thus failing to cooperate with the forest service, but he failed to deposit a duplicate tag at the ranger station, merely reporting the incident to that station. When he told Hecker about killing the deer he told him that he had deposited the duplicate tag at the forest service station, and that a ranger there had validated the tag. When Hecker inquired at the ranger station he discovered that no duplicate tag had been deposited there. Appellant then admitted that he had not deposited the tag, but mailed it himself to Los Angeles, and that he had also validated his own tag. This self-validation is legal, but a violation of the policy of the Fish and Game Commission. As a result of this incident appellant's key to the gate was taken from him and returned to the forest service.

There is considerable evidence by Hecker and others that on specified dates appellant, who had been instructed to patrol certain designated areas, in violation of instructions, patrolled other areas.

Hecker also testified that on August 2nd he and another warden took appellant on a patrol to acquaint him with the country, conditions and the people in the area. On this trip Hecker tried to point out to appellant the roads in the area, where people lived, certain areas where violations were likely to occur, houses where violaters lived and where people lived who would cooperate, etc. Appellant made no replies to any of this, took no notes, asked no questions and seemed totally disinterested in the whole trip.

There is other evidence of incidents not necessary to set forth in detail. Appellant offered an explanation of some of the incidents. He testified that, as the result of an automobile accident, he had difficulty in sleeping. Moreover, because he had to live in a trailer park where it was crowed and noisy, he had difficulty sleeping at nights. He stated, and corroborated his statement with his work sheet made out by himself, that the day prior to one of the sleeping incidents he had been on patrol for nineteen hours. While he admitted some of the sleeping incidents, he positively denied others. He tried to explain being late for appointments by the statement that he had difficulty finding a place to live and spent much time looking for a house, and with the claim that the instructions were indefinite. He denied knowledge of the circular letter containing the statements about shooting in a closed area, although the circular was sent to all wardens. He gave various explanations as to why he was frequently outside of his patrol area, and denied that Hecker had told him to confine his patrolling to designated areas.

[6, 7] These conflicts were for the trier of the facts. It is obvious that the hearing officer and the trial court did not believe all of the explanations offered by appellant. On several basic matters the evidence was conflicting. These conflicts must be resolved against appellant. While much of the evidence relates to small and unimportant acts, it must be remembered that we are here dealing with the rejection of a probationary employee, and not of a permanent employee. In such cases the appointing power has much more control and discretion than it possesses over permanent employees. Sufficient evidence was introduced to show that appellant slept on the job, did not get along with his fellow employees, did not cooperate with the forest service, lied to his superior officer and did not take a great interest in his job. Within the language of section 19173 of the Government Code the appointing power, the Personnel Board and the trial court were justified in finding that appellant did not demonstrate "merit, efficiency, fitness, and moral responsibility" and were justified in concluding that he should be rejected because of "the good of the service".

The judgment is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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102 Cal.App.2d 781

LOUPIAS v. ROSEN et al.

Civ. 14515.

District Court of Appeal, First District, Division 2, California.

March 13, 1951.

Action by Roger Loupias against Eli Rosen and Warren Cochran, in which plaintiff pleaded two causes of action, one for dissolution of partnership and for an accounting, the other for declaratory relief. The Superior Court, County of San Francisco, Lile T. Jacks, J., sustained defendants' demurrer to plaintiff's second amended complaint without leave to amend, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held complaint for declaratory relief subject to amendment, as it was not necessary that plaintiff plead facts showing that he was entitled to relief.

Judgment as to first cause of action affirmed, as to second cause of action, reversed with leave to amend.

1. Partnership ⟹327(1)

Where plaintiff's complaint for dissolution of partnership and for an accounting set forth that the partnership had been dissolved, but failed to allege fraud or misrepresentation in the dissolution, or that plaintiff sought to rescind the contract or offered to put the parties back in status quo, or that there were any transactions after the partnership was terminated, or that there was any property left calling for a receiver, or whether there were any partnership assets or liabilities or outstanding debts, the complaint was demurrable.

2. Appeal and error ⟹762

It is not proper practice in the reply brief on appeal to raise a question for the first time.

3. Declaratory judgment ⟹314, 324

Complaint alleging that partnership had been dissolved by agreement of all parties, that it was agreed that plaintiff should continue business and should execute a conditional sale contract covering all equipment of business as security for payment to defendants of specified sum, and that plaintiff executed the conditional sales agreement, was defective but was subject to amendment. Code Civ.Proc. § 1060.

4. Declaratory judgment ⚷313

Plaintiff, in an action for declaratory judgment, need not show in his pleading that he is entitled to relief under the contract pleaded, but only that an actual controversy exists. Code Civ.Proc. § 1060.

◆

Alfred F. Taddeucci, Ralph Bancroft, San Francisco, for appellant.

Morris M. Grupp, San Francisco, for respondents.

NOURSE, Presiding Justice.

The appeal is from a judgment on an order sustaining a demurrer to the second amended complaint without leave to amend. The complaint was framed to plead two causes—one for dissolution of a partnership and for an accounting, the other for declaratory relief.

The pertinent allegations of the first cause of action are:

"I

"On or about the 2nd day of November, 1946, plaintiff and defendants entered into and formed a joint adventure under an agreement in writing for the purpose of operating a certain laundry known as the Splendid French Laundry, located in the City and County of San Francisco, State of California, and that the parties hereto operated said laundry and transacted the business of said joint adventure until the 27th day of August, 1947, when said business was dissolved by agreement of all of the parties hereto;

"II

"At said time and thereupon by agreement between plaintiff and defendants, it was agreed between the parties hereto that plaintiff should continue the business of said Splendid French Laundry without liquidation of the affairs of said joint adventure and that the defendants would retire therefrom and assign and sell their rights therein to plaintiff for the sum of $43,362.22, said sum to be paid by a cash down payment of $13,362.22, and the balance of $31,000.00 to be paid at the rate of $600.00 per month from August 25, 1947, plus interest at six (6) per cent per annum; and further that plaintiff was to have the bills receivable to use the same for the purpose of paying off and discharging other debts of the said business and that plaintiff was to use the machinery, wares and merchandise belonging to said business, and from the profits thereof to pay, satisfy and discharge all debts of said joint adventure business as well as to pay the defendants the sum of $31,000.00 in the manner above stated;

"III

"At defendants' request it was further agreed that plaintiff should execute a conditional sale contract covering all of the equipment of said joint adventure laundry business, as security for the payments to the defendants of the said sum of $31,000.00; that on August 25, 1947, this plaintiff executed an alleged conditional sales agreement covering all the equipment of said joint adventure laundry business in the sum of $31,000.00, a copy of said alleged conditional sale contract is attached hereto, made a part hereof, and marked 'Exhibit A.'"

[1] The right of partners to a dissolution of the partnership by the express will of all the partners is recognized in section 2425(1)(c) of the Civil Code. The complaint alleges that such a dissolution took place on August 27, 1947, "by agreement of all of the parties hereto." The complaint does not attack the dissolution agreement on the ground of fraud, deceit, misrepresentation, or other equitable ground. It thus pleads an executed contract under which plaintiff received all the benefits accruing to him. He does not seek to rescind the contract and does not offer to put the parties in status quo.

He prays for an accounting of the dealings of the partnership "from the date of the dissolution", that a receiver be appointed to take possession of the partnership property, and for a distribution of the assets after payment of the liabilities. But he does not allege that there were any transactions of the partnership after its dissolution, that there is any property in the partnership calling for a receiver, or that there are any partnership assets or liabilities. If there are any assets of the partnership or any debts outstanding he does not plead them. And it should be noted that his second amended complaint was filed more than two years after the dissolution.

[2] In his second cause of action plaintiff seeks declaratory relief on the same facts pleaded in the first cause. He did not argue error as to this cause in his opening brief and respondent rightly assumed that the point was abandoned. By stipulation and order of court, appellant was granted leave to file his closing brief on the day the cause was set for oral argument. But oral argument was waived. In his reply brief the appellant for the first time raised the question of his rights under the second cause of action. This is not the proper practice of raising points on appeal. The respondent is entitled to know what error is charged so that he may make answer.

[3, 4] However we are disposed to overlook it since the complaint is subject to amendment. A complaint for declaratory relief does not need to plead facts showing plaintiff is entitled to relief. Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062. There the court said, 23 Cal.2d at page 730, 146 P.2d at page 678, 151 A.L.R. 1062: "Section 1060 of the Code of Civil Procedure provides that a party may bring an action for 'a declaration of his rights and duties in the premises' and that the 'declaration may be either affirmative or negative in form and effect.' It contains no suggestion that the pleader must allege facts entitling him to a favorable declaration. Cf. Zimmer v. Gorelnik, 42 Cal.App.2d 440, 448, 109 P.2d 34; Bank of America v. Gillett, 36 Cal.App.2d 453, 455, 97 P.2d 875; In re San Joaquin L[ight] & P[ower] Corp., 52 Cal.App.2d 814, 825, 127 P.2d 29." Thus a party may sue for a "declaratory judgment" as distinguished from declaratory "relief" though his pleading shows affirmatively that he is not entitled to any relief under the contract pleaded. But he should plead more than that a controversy exists and that plaintiff disputes defendants' claims under the express terms of a written contract which is plain and unambiguous; something to show that the controversy is real and not merely illusory, or, as section 1060 of the Code of Civil Procedure states, a case "of *actual controversy* relating to the legal rights and duties of the respective parties". (Emphasis ours.)

The judgment insofar as it relates to the first cause of action is affirmed. As to the second cause it is reversed with leave to amend.

The parties will bear their own costs.

DOOLING, J., and SCHOTTKY, Justice, pro tem., concur.

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103 Cal.App.2d 24

ANDERSON et al. v. LEE et al.

Civ. 18179.

District Court of Appeal, Second District,
Division 2, California.

March 21, 1951.

Hearing Denied May 17, 1951.

John G. Anderson and Lillian M. Anderson brought action against Paul M. Lee and others charging named defendant with usury and demanding that plaintiffs' note payable to named defendant in principal sum of $7,500 and their trust deed securing its payment be reformed to show $5,000 as principal of their debt, and that aggregate installment payments already made on note be credited as payments on the principal, and for general relief. A judgment for plaintiffs was entered in Superior Court, Los Angeles County, Clarence M. Hanson, J., and the named defendant alone appealed. The District Court of Appeal, Moore, P. J., held that where note for $7,500 was usurious in that it included a bonus of $2,500, in addition to provision for payment of interest at rate of 7%, makers of note were entitled to have amount of bonus stricken from note, together with credit upon remaining principal of the total payments made and of treble of the interest payments actually made, together with the provision that note should henceforth draw no interest.

Judgment affirmed.

1. Bills and notes 🔑337

An endorsee is charged with knowledge of a vice or defect in instrument of his purchase where circumstances are such as to justify conclusion that failure to make inquiry arose from a suspicion of such defect. Civ. Code, §§ 3133, 3137.

2. Bills and notes 🔑354

Although an offer to sell a secured note for two-thirds its value is not itself sufficient to raise an inference that instrument is tainted, is a circumstance fairly to be considered in determining question of buyer's good faith. Civ. Code, §§ 3133, 3137.

3. Usury 🔑26, 31

Parties are free to buy and sell promissory notes as they may buy and sell other property, and when bona fides of purchaser of note is established the extent of his profit is no concern to usury law, but when facts indicate that purchaser of a security had knowledge of an infirmity, or a grave suspicion thereof, his transaction is closely scrutinized to find the requisite good faith, and it is the substance, not the form, that is controlling. Civ. Code, §§ 3133, 3137; Gen. Laws, Act 3757; Const. art. 20, § 22.

4. Usury 🔑117

Evidence supports finding that defendant made loan to plaintiffs of $5,000 on a usurious note providing for payment of $7,500, plus interest at 7%, secured by trust deed and chattel mortgage, and that defendant was not a holder in due course of the note and, hence, usury statute was applicable. Civ. Code, §§ 3133, 3137; Gen. Laws, Act 3757; Const. art. 20, § 22.

5. Usury 🔑138, 146

Where note for $7,500 was usurious in that it included a bonus of $2,500 in addition to provision for payment of interest at rate of 7%, makers of note were entitled to have amount of bonus stricken from note, together with credit upon remaining principal of the total payments made and of treble of interest payments actually made, together with provision that note should henceforth draw no interest. Gen. Laws, Act 3757, § 3; Const. art. 20, § 22.

Hy Schwartz, Beverly Hills, for appellant.

Frye & Yudelson, North Hollywood, for respondents, Collman E. Yudelson, North Hollywood, of counsel.

MOORE, Presiding Justice.

In a complaint charging appellant with usury respondents demanded that their note payable to appellant in the principal sum of $7,500 and their trust deed securing its payment be reformed to show $5,000 as the principal or their debt, that the aggregate installment payments already made on the note be credited as payments on the principal, and for general relief. The facts were found as alleged by respondents and the decree adjudged that (1) the transaction involved was usurious, in violation of the initiative usury act of 1919, Deering's General Laws, Act 3757, and section 22, Article XX of the Constitution; (2) the principal sum of the debt due appellant is reduced to $5,000, less $1,650 the aggregate payments made on the principal; (3) the loan shall henceforth bear no interest and is credited with treble the sum of $437.25 already paid as interest.

The findings disclose that in August, 1948, respondents borrowed $5,000 from appellant and gave their note and a trust deed to secure its payment in monthly installments. For the use of the $5,000 appellant demanded the sum of $2,500 over and above the interest, the rate of which was not clearly expressed, making the principal of the note $7,500 with interest at 7 per cent per annum on the loan. As a part of appellant's scheme to evade the operation of the usury laws appellant and his broker, defendant Jack Freehill, opened an escrow at a bank on August 4, 1948. In it the note for $7,500 and the trust deed were deposited together with escrow instructions to be signed by appellant. Such instruments were in favor of Lillian M. Stout, mother of Mrs. Anderson, and they were to be executed by respondents. But before they had been signed by respondents, appellant examined and initialed them on August 12, 1948, as well as his escrow instructions. While such instructions refer to Mrs. Stout as lender, she had no interest in the transaction or in the moneys to be acquired by respondents, but was an innocent dupe of appellant and his broker and was their dummy for the purposes of effectuating the unlawul purpose and of creating an aura of legality for the usurious loan. Mrs. Stout had not visited the escrow department, approved the form of the note and trust deed or signed the escrow instructions prior to the day of appellant's approval of the writings. Besides the trust deed, appellant required respondents to execute as additional security a chattel mortage on the furniture and furnishings located on the real property described in the trust deed and to have it recorded along with the latter instrument in the official records of Los Angeles county. No actual loan was ever made by Mrs. Stout to respondents and all the documents deposited in the escrow purportedly opened for them and the asserted payment of $2,500 to respondents outside of escrow were pretense only. Mrs. Stout had no money to loan. She had met defendant Freehill while attempting to find a lender for respondents. After deducting $300 commission paid to Freehill and $98.45 escrow charges, respondents received the net sum of $4,601.55 from the transaction.

Appellant seeks reversal of the judgment on numerous grounds but emphasizes the want of evidentiary support for the finding that he made a "loan" to respondents. He earnestly insists that he was a holder in due course of a negotiable instrument, purchased prior to maturity for a valuable consideration paid in good faith and without notice of any infirmity in the instrument or defect in the title of his transferor, citing Civil Code, section 3133.[1]

[1] However, upon substantial evidence the trial court determined that Lee did not buy the instrument in good faith pursuant to Civil Code, section 3137, which provides: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." An indorsee is charged with knowledge of a vice or defect in the instrument of his purchase where the circumstances are such as to justify the conclusion that the failure to make inquiry arose from a suspicion of such defect. Christian v. California Bank, 30 Cal.2d 421, 425, 182 P.2d 554; see Popp Exchange Bank, 189 Cal. 296, 303, 208 P. 113; Jordan v. Grover, 99 Cal. 194, 33 P. 889.

[2] Had Lee inquired of Mrs. Stout or the Andersons, he would have learned that the mother had advanced no money; that the Andersons had received none, and that neither had been apprised of the form the transaction was to take. Notwithstanding his means of acquiring an intimate knowledge of the events that preceded the opening of the Stout escrow and his inability to obtain a written acknowledgment by respondents of their debt in the sum of $7,500 he continued with the transaction, signed the requisite documents, initialed the note in the Stout-Anderson file and paid money into the escrow, although neither the $7,500 note, the trust deed nor the escrow instructions between Mrs. Stout and respondents had been executed. Moreover, while witnessing those insignia of a precarious promissory note he was conscious of his own agreement to purchase it for an inadequate consideration. While an offer to

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[1] "A holder in due course is a holder who has taken the instrument under the following condtions:

"(1) That it is complete and regular upon its face;

"(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

"(3) That he took it in good faith and for value;

"(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

sell a secured note for two-thirds its value is not itself sufficient to raise an inference that the instrument is tainted, it is a circumstance fairly to be considered in determining the question of a buyer's good faith. Boyd v. Bearce, 48 Cal.App. 46, 50, 191 P. 560; Jordan v. Grover, supra, 99 Cal. 196, 33 P. 889.

[3, 4] Viewing the evidence as a whole it cannot be said that the findings are arbitrary or without ample support. Parties are free to buy and sell promissory notes as they may sell and buy other property. When the bona fides of the purchaser of a promissory note is established the extent of his profit is of no concern to the usury law. But when the facts indicate that the purchaser of a security had knowledge of an infirmity, or a grave suspicion thereof, his transaction is closely scrutinized to find the requisite good faith. It is the substance, not the form, that is controlling. Milana v. Credit Discount Company, 27 Cal.2d 335, 340–341, 163 P.2d 869, 165 A.L.R. 621; Batchelor v. Mandigo, 95 Cal.App.2d 816, 820, 213 P.2d 762. Piercing the trappings of the transaction in the instant cause it is manifest that its essence was an attempt to evade the usury laws and to exact a $2,500 bonus from the needy respondents on a $5,000 loan. The court's determination that appellant acted in bad faith cannot be dispelled by mere anguished cries of disappointment.

Appellant argues also that the court's failure to find upon some ten allegedly material issues is prejudicial error. Despite the protest it must be said that upon a large percentage of those issues the court made findings while others are in regard to immaterial matters. Appellant's real concern seems to be that such findings are adverse to him. No useful purpose would be served in discussing his numerous subordinate contentions at length. The spine of his appeal is disposed of by an affirmance of the finding that he did not in good faith purchase respondents' note in due course.

[5] Appellant's last argument is that the judgment is excessive in crediting upon the principal of the note the sums of $1,650 and $1,311.25. The former is the total payment made. The latter is the treble of interest collected from respondents where the entire amount of interest actually paid upon the loan has been ascertained. Such credits are authorized by the initiative act. Usury Law, sec. 3, Deering's General Laws, Act 3757, Statutes 1919, p. lxxxiii; Haines v. Commercial Mortgage Company, 200 Cal. 609, 617, 254 P. 956, 255 P. 805, 53 A.L.R. 725. Since usury was established it was proper for the court to strike from the note the amount of the bonus and to award the plaintiffs the treble of the interest payments actually made. Haines v. Commercial Mortgage Company, supra, 200 P. page 617, 254 P. 956, 255 P. 805.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

103 Cal.App.2d 5

PETERSEN v. DYNES et al.

No. 14475.

District Court of Appeal, First District,
Division 1, California.

March 21, 1951.

Catherine Petersen sued L. C. Dynes, and others, seeking to reform an agreement for the sale of land. The Superior Court in and for the County of Contra Costa, Hugh H. Donovan, J., rendered judgment in favor of defendants, and plaintiff appealed. The District Court of Appeal, Bray, J., held that the evidence sustained the trial court's finding that the intention and agreement of the parties had been that plaintiff sold and defendants bought, for $15,000, 3.63 acres of land, that there was neither mutual mistake nor mistake by plaintiff, and that plaintiff knew that she was selling and conveying, for that sum, 3.63 acres and not three acres only.

Affirmed.

1. Appeal and error 🔑1011(1)

Where there is substantial conflict in evidence, reviewing court is bound by trial court's findings.

2. Reformation of Instruments 🔑45(3)

In action by vendor to reform agreement for sale of tract of land on ground that .63 acres of land was included by mutual mistake or by mistake known to purchasers, evidence sustained trial court's finding that intention and agreement of parties had been that vendor sold and purchasers bought, for $15,000, 3.63 acres of land, that there had been neither a mutual mistake nor mistake by vendor, and that vendor knew that she was selling and conveying, for that sum, 3.63 acres and not three acres only.

3. Appeal and error 🔑994(3)

Matter of credibility of witnesses is for trial court, and its decision upon conflict of evidence cannot be disturbed by appellate court.

◆

Stanley C. Smallwood, Oakland, for appellant.

Krinsky & Abraham, Oakland, for respondents.

BRAY, Justice.

Plaintiff appealed from a judgment in favor of defendants in an action brought to reform an agreement evidenced by certain instructions to a title company on the ground of (1) mutual mistake, and (2) mistake by plaintiff known to and concealed by defendants, and for a money judgment.

Question Presented.

The insufficiency of the evidence to support the court's findings based upon the claim that the evidence in favor of defendants is improbable and not sufficient legally to constitute a conflict with plaintiff's evidence.

Facts.

The controversy arises out of a sale by plaintiff to defendants of a portion of a tract of land in Contra Costa County. The land actually conveyed is 3.63 acres. Plaintiff contends that the .63 acres was included by mutual mistake or by her mistake known to the defendants. There were a number of conversations between plaintiff and defendant Dynes relating to the transaction. It is not necessary to detail them all. The gist of plaintiff's testimony is that she was asked by Dynes if she wanted to sell any of her land and if so, its price. She stated she would sell at $5,000 per acre. Dynes said he wanted 3 acres for which he would pay $5,000 an acre or $15,000. It was agreed that there would have to be a survey and they agreed upon the surveyor. Later Dynes brought her a deposit receipt which she signed in triplicate, after she had required that the name therein, Kate Petersen, be changed to Catherine A. Petersen. This acknowledged receipt from defendants of $100 on account of the purchase price of "That certain three (3) acres, more or less, in the name of Catherine A. Petersen bounded on the North by Parker on the West by Rose, and with a highway frontage of approximately three hundred twenty-seven (327) feet on U. S. Highway 21.

"*The total purchase price is* Five Thousand Dollars ($5,000.00) per acre (Three (3) ~~Dollars~~ acres, more or less, to be paid for on a basis of $5,000.00 an acre plus a) —— *and the balance of same is to be paid within* —— *days from date hereof, as follows:* frontage of fifty-seven (57) feet on the Highway and approximately five hundred (500) feet deep.

"Balance of purchase price to be paid in cash to Contra Costa County Title Co.

"(Fourteen Thousand Nine Hundred ($14,900.00) Dollars)"

(The italicized portions are printed; the other portions are typewritten, the portion reading "acres, more or less, to be paid for on a basis of $5,000 an acre plus a" being interlined between the printed matter; and on plaintiff's copy (plaintiff's exhibit 1) the last line above quoted, "(Fourteen Thousand Nine Hundred ($14,900.00) Dollars)" has been typed in after the carbon copy was made.)

Dynes testified that at the time plaintiff signed the receipt it contained the above notation that the balance due was $14,900. Plaintiff did not testify positively that this notation was not there when she signed it. She said she did not know, would not say, and could not remember. Defendant Kirk could not remember, either, whether it was there before he signed the receipt. Plaintiff said she received from Dynes 3 days later one of the copies which she had signed. She produced this copy, and had it admitted in evidence. It contains the notation. The title company sent her an original and copy of escrow instructions to be signed, which she did. At the bottom of one column it stated "1947 Co. Taxes in full $117.30 on 5.91 acres owned by you You will receive credit through escrow for the purchases pro rata on the parcel now being conveyed by you." (Deducting 5.91 from the 9.54 total acreage owned by plaintiff leaves 3.63 acres.) The deed which plaintiff signed and left with the title company conveys 3.63 acres. She stated she did not discover that she had conveyed the extra .63 acres until about two months after the transaction was closed. Plaintiff testified that at no time did she realize that she was selling or conveying more than 3 acres.

Dynes' testimony was to the effect that plaintiff quoted him a price of $5000 per acre and that he said he would take 3 acres provided the Planning Commission would pass it for subdivision building purposes; that later he told her he needed additional land for a road. Plaintiff told him to forget it; that she was not interested in a road. He also told her that he wanted to put up 8 houses on the premises; and that he had been to the Planning Commission and that 3 acres would not do him any good, as the commission required close to half an acre for each home, and that $15,000 was all he had to spend for land, and that unless he got 57 feet more frontage than the 3 acres included he could not purchase the property. She said she would think it over. Plaintiff testified she did not remember such a conversation, but that he did say he was going to the commission. Later defendant said she came to his work shop. He told her he had thrown up the deal because the Planning Commission would not let him cut up the lots "that small" but if she would give him the 57 feet for the $15,000 he would try it again. The 3 acres provided 270 feet only on the highway. With the additional 57 feet defendant would have 327 feet frontage. Plaintiff said that $5,000 an acre was a lot of money and that she would throw the 57 feet in. She would accept $15,000 as the purchase price of the 327 feet. This conversation was partially corroborated by Mrs. Dynes. Thereafter Dynes had the deposit receipt drawn up, consisting of three duplicate originals. Plaintiff read them, and after they were corrected, signed all three. He took them away, and after they were signed by defendants Dr. and Mrs. Kirk, Dynes gave one to the title company, one to plaintiff, and kept one. Before plaintiff agreed to give the 57 feet, he had instructed the surveyor to discontinue the survey. After plaintiff signed the receipt he instructed the surveyor to prepare a survey on the basis of a frontage of 327 feet. Dynes gave plaintiff a copy of the survey, telling her it was a survey of the property. Plaintiff denied receiving this. The title company, on Dynes' instructions, prepared escrow instructions and a deed and sent them to plaintiff by mail. Dynes took her to a notary's office where she signed the instructions and the deed.

Findings.

The court found that the intention and agreement of the parties was that plaintiff sold and defendants bought for $15,000, 3.63 acres of land; that there was neither a mutual mistake nor a mistake by plaintiff, and that plaintiff knew that she was selling and conveying for that sum 3.63 acres, and not 3 acres only.

Evidence Sufficient.

The case is a factual one in which there is a positive conflict between plaintiff's testimony and that of Dynes. Dynes testified that he moved a stake to the point necessary to give him the additional land he needed for a road on the proposed subdivision of 8 homes. Apparently this was after the first survey was made, giving a frontage of only 270 feet. Plaintiff testified she could not remember whether he told her about his desire to subdivide, but that he told her he had moved a stake back 47 feet and told her to go and see it. She could not find it so later he took her out on the road and showed it to her. She claims he did not state for what purpose he had moved the stake nor did she ask him as she was not interested. It is not reasonable to expect a court to believe that while the matter of purchase was still under discussion and the prospective buyer moved a stake on the ground which she was contemplating buying, there would not be some discussion as to his purpose in so doing. Again, plaintiff does not deny the conversation in which both Mr. and Mrs. Dynes testified she agreed to convey the additional land. She just does not remember. She admits that before she signed the receipt she read it and that it then read "Three (3) acres, more or less, to be paid for on a basis of $5,000.00 an acre *plus a frontage of* fifty-seven (57) feet on the Highway * * *." (Emphasis added.) Moreover, when told by Dynes that he would need a road, she said "Forget it * * * I'm not interested." Yet she admits he then said he would have to see the Planning Commission, and still she claims she does not remember him telling her he wanted the property for subdivision purposes. He testified that after he saw the commission, he reported what the commission required, and told her that unless he could have additional land he would not buy. She claims that in none of the conversations subsequent to his statement about seeing the commission did she inquire nor did he tell her, what the commission required. Or, rather, she did not deny that he told her but contented herself with saying that she did not remember.

[1, 2] From the record, plaintiff appears to have been an unsatisfactory witness. As to most of the instances in which Dynes' story of the conversations between her and him differs from hers, she did not positively deny them. Her answers usually were that she did not remember or did not recall. Whether this was due to witness-stand fright, actual or feigned lack of memory, or other reasons, the trial court observing her manner of testifying was in a much better position to determine than we are from the cold record before us. That is one of the reasons for the prudent and oft-quoted rule that where there is a substantial conflict in the evidence, the reviewing court is bound by the trial court's findings. The court believed Dynes, and his testimony alone is sufficient to support the findings.

In addition to the contention that the evidence does not support the judgment, plaintiff contends that the deposit receipt clearly shows that the parties were dealing upon a $5,000 per acre basis. The receipt states that "The total purchase price is Five Thousand Dollars ($5,000.00) per acre * * * to be paid for on a basis of $5,000 an acre *plus a frontage of fifty-seven (57) feet * * * Balance of purchase price * * * $14,900.00 * * *.*" (Emphasis added.) While the receipt does state the price as $5,000 per acre, the balance of its language supports defendants' version of the transaction. "In arriving at a solution of the problem, the written contract itself was an important factual element, evidence of a high order that could not be disregarded. Furthermore, this important evidentiary factor derives no inconsiderable support from the established legal presumption that, having been deliberately executed, it correctly expressed the intention of the parties. Welk v. Conner, 102 Cal.App. 286, 289, 282 P. 963. The presumption is not conclusive and may be overcome by satisfactory evidence which shows that the written instrument is not in conformity with the true agreement of the parties. The burden of overcoming the presumption, however, rests upon him who seeks to avoid the plain terms of the written contract. [Citations.] This burden is rendered the more onerous because of the announced rule that the evidence which is relied upon to establish the existence of fraud or mistake as a ground for revision must be clear and convincing and not loose, equivocal, or contradictory, leaving the question of fraud or mistake in doubt." California Trust Co. v. Cohn, 9 Cal.App.2d 33, 39–40, 48 P.2d 744, 748. But, says plaintiff, the receipt (if construed adversely to her), the escrow instructions and the deed failed to express her intention. However, while there is evidence which might have supported a finding in her favor, there is substantial evidence (if not the preponderance of evidence) which shows that she made no mistake. It is true that the receipt is inexpertly drawn, but that fact does not prove plaintiff's contention.

[3] Plaintiff urges us to disregard the testimony of Mr. and Mrs. Dynes, on the authority, she says, of Clarke v. Fiedler, 44 Cal.App.2d 838, 113 P.2d 275. In the quoted portion the court said, "If we disregard, *as the trial court did,* the testimony of respondent * * *" (44 Cal.App.2d at page 846, 113 P.2d at page 280, emphasis added), there is no creditable contradiction of appellant. Plaintiff would have us reweigh the evidence, and as the trial court *did not do,* reject the testimony of Mr. and Mrs. Dynes. As the trial court here obviously rejected plaintiff's testimony, the Clarke case supports the position of defendants rather than that of plaintiff. The following language from the Clarke case is appropriate (44 Cal.App.2d at page 845, 113 P.2d at page 279): "Had the court adopted respondent's version of the negotiations and the nature of the proposed written agreement, we would not be justified in disturbing his findings based thereon, because it is only when we can say that the testimony relied upon by the trial court to support its judgment is inherently improbable that we may disturb the findings * * *." The testimony relied upon by defendants here is not inherently improbable. The matter of the credibility of witnesses is for the trial court. Its decision upon a conflict of evidence cannot be disturbed by this court. "It is not sufficient upon appeal to point out, or even demonstrate to this court, that the judgment is against the preponderance of the evidence, or that upon the same evidence other persons would come to a different conclusion. If there is any substantial evidence upon which the court could have found its judgment it must be upheld." Bradford v. Southern Cal. Petroleum Corp., 62 Cal.App.2d 450, 461, 145 P.2d 36, 41.

Plaintiff quotes Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220, Lefrooth v. Prentice, 202 Cal. 215, 259 P. 947, and Fewel & Dawes, Inc., v. Pratt, 17 Cal.2d 85, 109 P.2d 650, in support of her contention that defendants' evidence was improbable and hence did not create a conflict. Those cases do not apply here as an examination thereof fails to disclose any improbability therein. As pointed out herein, several portions of plaintiff's own testimony bear an element of improbability.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

102 Cal.App.2d 875

PEOPLE v. SCHUNKE.

Crim. 4617.

District Court of Appeal, Second District, Division 1, California.

March 19, 1951.

Rehearing Denied April 2, 1951.

Verne J. Schunke was convicted of robbery of the first degree. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., sustained the people's demurrer to his petition for a writ of mandate and denied his applications for a writ of habeas corpus and for a writ of error coram nobis and he appealed and the people moved to dismiss the appeal. The District Court of Appeal, White, P. J., held, inter alia, that application for writ of habeas corpus was required to be presented to Superior Court of county in which prison in which petitioner was confined was located.

Appeal dismissed.

1. Mandamus 🔑1

The writ of mandate is an independent proceeding having for its purpose the compulsion of an act which the law specifically enjoins as a duty resulting from an office, trust or station, and has no characteristics or functions of a criminal prosecution.

2. Criminal law 🔑1134(8)

Order of trial court sustaining people's demurrer to appellant's application for writ of mandate could not be considered on appeal from order denying appellant's petition for writ of error coram nobis, in connection with which petition for writ of mandate was filed.

3. Habeas corpus 🔑113(3)

An order denying a writ of habeas corpus is not appealable. Pen.Code, § 1506.

4. Habeas corpus 🔑48

A prisoner in state prison was required to present application for writ of habeas corpus to superior court of county in which such prison was located.

5. Criminal law 🔑997

District Court of Appeal, which decided appeal from judgment of conviction sought to be vacated by petition for writ of error coram nobis, had exclusive jurisdiction of petition, and superior court was without jurisdiction to entertain petition. Pen.Code, § 1309.

◆

Verne J. Schunke, in pro. per.

Edmund C. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

The people moved to dismiss an appeal taken from the following orders of the Superior Court of Los Angeles County: (1) an order sustaining the people's demurrer to appellant's petition for a Writ of Mandate; (2) an order denying appellant's application for a writ of Habeas Corpus; (3) an order denying appellant's petition for a writ of Error Coram Nobis.

In support of the motion to dismiss the appeal it is urged that the appeal from the first above mentioned order is ineffectual because mandamus is an independent proceeding; that the appeal from the second order aforesaid is ineffectual because the order denying an application for a writ of habeas corpus is non-appealable; and that the appeal from the order denying appellant's petition for a writ of error coram nobis is also ineffectual for the reason that the superior court was without jurisdiction to entertain said petition.

As to appellant's petition for a writ of mandate, the record reveals that such petition was filed "in connection with his writ of error coram nobis and habeas corpus", directed to the District Attorney of Los Angeles County "for a settlement of petitioner's writ that was sent to this honorable court over 90 days ago, and the said officer shall appear before this honorable trial court, and show cause why said order should remain in full force and effect, to allow petitioner his legal and constitutional rights, as guaranteed by the federal constitution and the constitution of the State of California, and all the statutes made pursuant thereto; and to compel the said State Officer of the City and County of Los Angeles to show cause why petitioner was not granted a hearing upon his writ of error coram nobis, habeas corpus, or, a new trial."

[1, 2] In this state, the writ of mandate is an independent proceeding having for its purpose the compulsion of an act which the law specifically enjoins as a duty resulting from an office, trust or station, Sheehan v. Board of Police Commissioners, 188 Cal. 525, 535, 206 P. 70. It has none of the characteristics or functions of a criminal action, is independent thereof, and cannot, under the facts here present, be considered on an appeal from the order made in the writ of error coram nobis proceeding "in connection with which" the petition for a writ of mandate was filed.

[3, 4] Appellant's attempted appeal from the order denying his application for a writ of habeas corpus is equally unavailing for two reasons. Firstly, an appeal by petitioner from an order denying a writ of habeas corpus is not authorized by law, Loustalot v. Superior Court, 30 Cal.2d 905, 913, 186 P.2d 673; Penal Code, section 1506. Secondly, at the time appellant filed his application for a writ of habeas corpus he was confined in the state Prison at Represa, in the County of Sacramento, and it is to the superior court of that county that he was required to present his application for such writ, People v. Dunlop, 102 Cal.App.2d 314, 227 P.2d 281.

Appellant's attempted appeal from the order denying his petition for a writ of error coram nobis is equally unavailing.

The record reflects that an information was filed March 7, 1941, in the Superior Court of Los Angeles County charging appellant with robbery and violation of the Deadly Weapons Act Gen.Laws, Act 1970, with several prior convictions. He was found guilty of robbery of the first degree, not guilty of violation of the Deadly Weapons Act, and was sentenced to the State Prison for the term of his natural life. His appeal from the judgment and order denying a new trial was affirmed October 30, 1941. People v. Schunke, 47 Cal.App. 2d 542, 118 P.2d 314. *His petition herein for writ of error coram nobis was filed with the County Clerk of Los Angeles County in the month of October, 1950 and denied October 31, 1950.*

[5] Section 1265 of the Penal Code, as amended, (Stats. 1949, ch. 1309, sec. 2, in effect October 1, 1949), restricted appellant to filing his petition for a writ of error coram nobis with this court which decided his appeal from the judgment now sought to be vacated. The superior court was without jurisdiction to entertain appellant's petition because this court had exclusive jurisdiction thereof, People v. Dunlop, supra, 102 Cal.App.2d at page 314, 227 P.2d 281.

The appeal is dismissed.

DRAPEAU, J., and HANSON, Justice pro tem., concur.

36 Cal.2d 860

COBARRUBIA et al. v. BUCHANAN et al.

S. F. 18215.

Supreme Court of California, in Bank.
March 23, 1951.

Rehearing Denied April 19, 1951.

Action by Monica Cobarrubia, and others, against Roy Buchanan, and others, to recover for the wrongful death of Fernando Rodriguez in a collision between two trucks. The Superior Court, Fresno County, Philip Conley, J., rendered a judgment for the defendants, and the plaintiffs appealed. The Supreme Court, Edmonds, J., held that the giving of an instruction on assumption of risk was prejudicial error.

Judgment reversed.

Spence, J., dissented.

Prior opinion, see 219 P.2d 31.

Appeal and error 🔑1066
Trial 🔑252(8)

In action for death of occupant of truck which was struck by oncoming pickup truck driven by defendant who made left turn in front of first truck, in absence of evidence that occupant had reason to believe his driver was careless or reckless or that he had knowledge of speed of truck in which he was riding or of nature of intersection at which collision occurred, giving of instruction on assumption of risk with respect to excessive speed was prejudicial error. Vehicle Code, § 510.

◆

John D. Chinello, Fresno, for appellants.

Chester O. Hansen and John Said, Fresno, for respondents.

EDMONDS, Justice.

The surviving children of Fernando Rodriguez sued to recover damages for the wrongful death of their father. The appeal from the judgment entered upon a verdict in favor of the defendants principally concerns instructions which were given upon the issues of contributory negligence, imputed negligence, assumption of risk, and unavoidable accident.

The accident occurred while Rodriguez was riding in a truck owned and driven by Frank Hernandez. At the intersection of Kearney Boulevard and Grant Avenue, it collided with one driven by Roy Buchanan of which Robert F. Brown was the owner.

Kearney Boulevard is an east-west highway which is divided into two "lanes" by a row of trees. The highway to the north of the trees, referred to as the "truck lane", is for the use of both eastbound and westbound traffic. It is a paved roadway approximately 10 or 11 feet wide with abutting shoulders from three to six feet in width.

South of the trees, the highway is for the use of vehicles other than trucks. It is of the same width with abutting shoulders, and is called the "boulevard lane". Grant Avenue, a north-south roadway, intersects at right angles the two lanes and the row of trees, terminating at the southerly line of Kearney Boulevard.

There are no stop signs at the intersection. The thick growth of trees between the truck and boulevard lanes makes the intersection a "blind" one for vehicles moving north on Grant Avenue across the truck lane. Also, fig trees planted on the property adjacent to the northeast corner of the intersection create a "blind crossing" for vehicles traveling west along the truck lane.

According to the testimony of Buchanan, he was driving a pickup truck in an easterly direction along the boulevard lane at a speed of 20 to 25 miles per hour. When approximately 65 feet from the intersection, he decreased his speed and gave a signal for a left turn into Grant Avenue. The turn was made at a speed of one to two miles per hour. His truck was in low gear when he started to turn, and he increased the speed to two or three miles per hour as he started across the truck lane. When approaching the paved portion of the truck lane, he looked to the left and the right.

Buchanan told the jury that he again looked to his right when the front of his vehicle was two or three feet on the pavement. This time he saw the truck driven by Hernandez. Although his first reaction was to cross in front of the oncoming vehicle, he applied his brakes when five or six feet onto the paved truck lane. Hernandez did not decrease the speed of 45 to 55 miles per hour at which his truck was moving, and it struck the right front wheel of Buchanan's truck, which was then five or six feet north of the south pavement line of the truck lane, turning it almost completely around.

Hernandez testified that he was proceeding west along the truck lane, which he knew to be a dangerous road. When 30 or 40 feet from the intersection, he saw the pickup truck entering the truck lane. He did not then know whether its driver intended to turn east on the truck lane or continue north on Grant Avenue.

At this point, Hernandez said, he applied his brakes but ". . . not too much . . . ." When approximately five to eight feet from the intersection, he saw there was going to be a collision. He then applied his brakes "hard". He told the jury that his brakes were in good condition and he could stop the truck within three or four feet when traveling at 25 or 30 miles per hour.

According to photographs taken at the scene of the accident and the testimony of a highway patrolman, the truck driven by Hernandez left a single skid mark approximately six feet long, and tire marks for a distance of 72 feet from the point of collision to the place where the truck was brought to a stop. An expert on brakes testified that if those on the Hernandez truck had been properly adjusted, they would have caused four skid marks instead of one.

Rodriguez was voluntarily riding, with other workmen, in the rear of the truck driven by Hernandez. He had been doing so, almost daily, for two weeks prior to the accident. During that time, Hernandez testified, he traveled the same route and, at the place where the accident occurred, drove at substantially the same rate of speed. Rodriguez had never complained to Hernandez in respect to the manner of driving or the condition of the roadway, nor did he have knowledge of any mechanical defects in the truck.

Upon this evidence, the jury returned a verdict in favor of Buchanan and Brown. Among the several grounds urged for reversal of the judgment, the heirs of Rodriguez contend that there is no evidence which supports the giving of an instruction upon the doctrine of assumption of risk.

At the request of the respondents, the following instruction was given: "You are instructed that if you find from the evidence that * * * Hernandez was operating the Ford truck in which * * * Rodriguez was riding, at a dangerous and excessive rate of speed at and immediately prior to the time of the collision in question, and that such dangerous and excessive rate of speed was a proximate cause of the injury complained of, and if you further find that * * * Rodriguez, *knew that said Ford truck was being operated at a dangerous and excessive rate of speed,* and that he consented thereto, then I instruct you that * * * Rodriguez is deemed in law to have assumed and consented to all risks incurred by reason of such excessive speed." (Italics added.)

Hernandez testified that, when approaching the intersection, his truck was traveling at 25 or 30 miles per hour. Buchanan estimated the speed to be 45 or 55 miles per hour. Rodriguez and some other men were in the rear part of the truck, behind the driver's cab, but his exact position is not fixed by the evidence. The bed of the truck was surrounded by sideboards some three or four feet in height, and there is no evidence that Rodriguez was in a position to see over them.

The respondents argue that a passenger need not be in the front seat of a vehicle, looking at the speedometer and roadway ahead, in order to know the speed at which the vehicle is being driven. They assert that the vibration and sound of the truck, an "open air" model, being driven at a speed of 45 or 55 miles per hour "would indicate to one sitting behind the cab its speed, to a certain extent".

The fallacy in this argument is that such a speed was not necessarily "dangerous and excessive". The requirement laid upon a driver is that he shall not drive "at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property". Veh.

Code, § 510. It may be assumed that there is sufficient evidence to support an implied finding of excessive speed. However, the speed was excessive only because of the "blind intersection" at which the accident occurred. The respondents failed to prove that Rodriguez had any knowledge of this intersection although he had ridden with Hernandez upon previous occasions. For all that appears, Rodriguez had never ridden in the truck in a position to see any of the intersections. Neither is there any evidence to show that he had reason to believe Hernandez was a careless or reckless driver. Under these circumstances, the giving of the challenged instruction constituted prejudicial error.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

SPENCE, Justice.

I dissent.

I am of the opinion that there was no prejudicial error in the instructions and that the judgment should be affirmed.

Rehearing denied; SPENCE, J., dissenting.

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102 Cal.App.2d 814

PEOPLE v. NICCOLI.

Civ. 17596.

District Court of Appeal, Second District, Division 1, California.

March 13, 1951.

Rehearing Denied April 9, 1951.

Hearing Denied May 10, 1951.

Frank Niccoli was indicted in a criminal action and an undertaking of bail was filed by the National Automobile and Casualty Insurance Company, a corporation. When the cause was called for trial the defendant failed to appear, and the court declared the undertaking of bail forfeited. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered an order denying the insurance company's motion to set aside the forfeiture, and the insurance company appealed. The District Court of Appeal, White, P. J., held that the order appealed from was not so plainly erroneous as to amount to an abuse of discretion.

Affirmed.

1. Bail 🔑79(1, 2)

Order denying bondsman's motion to set aside forfeiture of bail bond is in discretion of lower court and will not be disturbed on appeal, unless so plainly erroneous as to amount to abuse of discretion Pen.Code, § 1305.

2. Bail 🔑79(1)

Discretion resting in trial court to order forfeiture of bail bond is not a capricious discretion but impartial, and court is guided and controlled in its exercise by fixed legal principles, and such discretion is not a mental discretion, to be exercised ex gratis, but a legal discretion, to be exercised in conformity with spirit of law and in manner to subserve and not to impede or defeat ends of justice, and its exercise is limited to doubtful cases, where an impartial mind would hesitate. Pen.Code, § 1305.

3. Death 🔑1

A person unheard of for a period of time is presumed to be alive until expiration of seven years. Code Civ.Proc. § 1963, subd. 26.

4. Bail 🔑79(2)

In proceeding to set aside forfeiture of bail bond for failure of defendant to appear at criminal trial, burden was upon bondsman to establish by competent evidence a satisfactory excuse for defendant's failure to appear. Pen.Code, § 1305.

5. Death 🔑4

Presumption of life for seven years after one's disappearance is not exclusive, but may be rebutted by direct or circumstantial evidence which establishes to satisfaction of court that disappearance, except because of death, was without motive and inconsistent with very nature of person. Code Civ.Proc. § 1963, subd. 26.

6. Death 🔑2(1)

If person at time he was last seen was a fugitive from justice, bankrupt, or from other causes it would be improbable that he would be heard from even though alive, then no inference of death will be drawn. Code Civ.Proc. § 1963, subd. 26.

7. Death 🔑1

Where a motive exists, or doubt as to reason for disappearance exists, presumption of continued existence will not be shortened. Code Civ.Proc. § 1963, subd. 26.

8. Bail 🔑79(1)

In proceeding to set aside forfeiture of bail bond for failure of defendant to appear at criminal trial, trial court did not abuse its discretion in refusing to set aside its order forfeiting bail bond on ground that defendant was dead at time order of forfeiture was made. Pen.Code, § 1305; Code Civ.Proc. § 1963, subd. 26.

9. Appeal and error 🔑1008(1)

Where question in case is one of fact for trial court, judgment of appellate tribunal cannot substitute its conclusion for that reached by trial court.

10. Bail 🔑79(2)

In action to set aside forfeiture of bail bond for failure of defendant to appear at criminal trial, where one witness was a guarantor on defendant's bail bond, and other witnesses, included defendant's mother and sister, employees of guarantor, and friends of defendant, one of whom had been convicted of a felony, court was entitled to weigh their testimony in light that they could have had a direct or indirect interest in determination of question as to defendant's status as living or dead, and was an exception to the general rule that uncontradicted testimony of witness to particular fact is binding on court. Pen.Code, § 1305.

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Vernon L. Ferguson, Samuel L. Rummel, Los Angeles, Thomas B. Sawyer, San Pedro, for appellant.

Harold W. Kennedy, County Counsel, John D. Maharg, Deputy County Counsel, Los Angeles, for respondent.

WHITE, Presiding Justice.

The above-named defendant had been indicted in a criminal action and undertaking of bail was filed by appellant National Automobile and Casualty Insurance Company, a corporation. When the cause was called for trial the defendant failed to appear and the court declared forfeited the undertaking of bail. On December 28, 1949, the court made and entered its order denying appellant's motion to set aside said forfeiture (Penal Code, sec. 1305). It is from the last-named order of December 28, 1949 refusing to set aside the forfeiture that this appeal is taken.

The record reveals that Michael Cohen and twelve other individuals, including defendant herein, were indicted by the Grand Jury of Los Angeles County on April 12, 1949 for the crime of conspiracy to violate sections 245, 211, and 182, subd. 5 of the Penal Code. Subsequently, all the defendants who went to trial were acquitted.

So far as shown by the record, defendant Niccoli was last seen alive on the afternoon of September 2, 1949 at the apartment of two ladies, Pat Briar and Caroline Shaw, friends of his. On that occasion he stated to them that he was going to the airport to meet some friends. Pat Briar asked the defendant if she could accompany him. He inquired as to "How long will it take you to get dressed?" According to the testimony of Pat Briar she "started to get dressed, and he looked at his watch and he said, 'Gee, I haven't time, I'll have to go to the airport and I'll call you from the airport after I meet my friends'." After telling Miss Briar to "Go ahead and keep dressing, and to have Caroline dress—the two of you can have dinner with me and my friends. I will call you from the airport", defendant departed at about 4:30 p.m.

On the evening of September 3, 1949, Miss Da Loune David, a friend of the defendant, was present at a dinner party in the home of Michael Cohen. Thinking it "rather strange" that she had not heard from defendant Niccoli who was in the habit of telephoning her, Miss David made inquiry of others present at the Cohen home as to whether they had talked with defendant Niccoli, and as to whether he was coming to the dinner. Receiving negative answers, the witness acting, as she testified, on "simply a hunch" went to the airport at approximately 3:15 a. m. on the morning of September 4, 1949. She was familiar with defendant Niccoli's automobile, having operated it a number of times. Upon searching the auto-park adjacent to the airport the witness came upon the automobile of the defendant. The windows were down and the ignition keys were missing. The witness thereupon telephoned Mr. Cohen and went home. The parking ticket found upon the vehicle by Miss David indicated that it entered the parking lot at 5:53 p. m., September 2, 1949.

On September 21, 1949, a laborer employed by the City of Los Angeles to clean out catch basins in connection with storm drain sewers, found a keyring and keys in a catch basin at 43d Street and Normandie Avenue, some distance from the airport auto park at which the machine was parked. One of the working crew noticed Niccoli's name on the tag attached to the keyring and delivered the keys to the sheriff's office. One of the keys unlocked a piece of luggage found in Niccoli's apartment, another unlocked the ignition of his automobile and opened the door thereof, while another key unlocked the glove compartment. At the place where they were found the keys were not visible from the street until the cover was pulled off the catch basin. They were three or four feet below the surface, and it is a reasonable assumption, as urged by appellant, that the keys did not get into the catch basin by accident but were placed there for concealment.

There was testimony that defendant Niccoli had been in Los Angeles since January 1949; that he was devoted to his mother who resided with her daughter in Cleveland, Ohio. He regularly sent $60 a month to his mother, the last check for this amount having been received by her some two weeks before his disappearance. He telephoned his mother on four occasions after his arrival in Los Angeles and was much concerned about his mother's health. There was evidence that both to his family as well as to friends defendant Niccoli had stated a lack of fear on his part as to the outcome of his trial under the aforesaid indictment, "that he was not worried too much about it". There was evidence that during the pendency of the indictment, Niccoli was present, with others, as a guest of Michael Cohen at a cafe located in unincorporated territory commonly known as the "county strip", which "strip" adjoined the City of Los Angeles, upon which occasion the party was attacked from ambush. In this attack, one of Cohen's guests, named Neddie Herbert, was killed, while Cohen and other members of the party received serious gunshot wounds. There was testimony that Niccoli was very fond of Cohen and that the latter was a guarantor upon the former's $50,000 bail bond. There was also testimony that Niccoli intended to go into the cigarette business in Los Angeles and that because of his own lack of finances was attempting to raise money to finance the business.

It is undisputed in the evidence that defendant Niccoli was in impecunious circumstances and that the $60 he was sending his mother each month was a drain upon him. That he borrowed money from his friends and associates from time to time. That he was continually complaining about being "broke". The record reflects that Niccoli was indebted to a finance company in Cleveland, Ohio, in connection with the purchase of his automobile; that his payments thereon amounted to $92.48 per month. That on September 6, 1949, some four days after the defendant's disappearance, the finance company received from Niccoli an installment payment of $92.48. While no letter of transmittal accompanied said remittance, it was established that the money order in question was obtained by defendant Niccoli.

It was also established that on September 7, 1949, defendant Niccoli's apartment was found to be in good order. A jar of pennies was sitting on a cabinet, razor blades were in the bathroom cabinet as well as his shaving cream, tooth paste and a toothbrush. Wearing apparel in the way of suits, coats, shoes, underwear, ties and handkerchiefs were found in the apartment. A box of money containing silver amounting to $65.20 was found in a hatbox.

Without narrating in detail the efforts made to locate defendant Niccoli following his disappearance, suffice it to say that an intensive search for him was made by law enforcement agencies, friends, and appellant insurance company, all to no avail.

At the hearing in the superior court the People offered no evidence to prove that defendant Niccoli was alive subsequent to September 2, 1949, and relied solely upon the premise that the burden of proving death was upon appellant and that such burden had not been met.

The sole ground of this appeal is that the evidence produced in the superior court in support of the motion to set aside the forfeiture of the bail bond conclusively proved that the defendant Niccoli was dead at the time the order of forfeiture was made; that the court below abused the discretion vested in it under the provisions of section 1305 of the Penal Code in refusing to set aside its order forfeiting the defendant's undertaking of bail.

The provisions of the pertinent penal code section just cited are as follows: "If, without sufficient excuse, the defendant neglects to appear for arraignment or for trial or judgment, or upon any other occasion when his presence in court is lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes and the undertaking of bail, or the money deposited instead of bail, as the case may be, must thereupon be declared forfeited. *But if at any time within 90 days after such entry in the minutes, the defendant and his bail appear, or if the defendant is dead and his bail appears, and satisfactorily excuse the defendant's neglect and show to the satisfaction of the court that the absence of the defendant was not with the connivance of the bail, the court may direct the forfeiture of the undertaking or the deposit to be discharged upon such terms as may be just.*" (Emphasis added.)

[1] It is conceded that orders like the present, in legal parlance, rest very much in the discretion of the court below, and will not be disturbed by this court unless we are satisfied that the order is so plainly erroneous as to amount to an abuse of discretion.

The correct principle for the exercise of sound discretion is set forth in the early case of Bailey v. Taaffe, 29 Cal. 422, 424, and thereafter quoted with approval in the cases of Demens v. Huene, 89 Cal.App. 748, 753, 265 P. 389, and Atkinson v. Atkinson, 35 Cal.App.2d 705, 708, 96 P.2d 824.

[2] In the case first cited it was said, "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates."

[3] A disputable presumption exists that a person who is absent or unheard of for seven years is dead (Code Civ.Proc., sec. 1963, subd. 26). Conversely, as recognized by the parties to this action, a person unheard of for a period of time is presumed to be alive until the expiration of seven years. Therefore, in the present case, if it be doubted whether the evidence offered in the superior court, when examined under those rules of law by which judges are guided to a conclusion, was sufficient to "quicken the time" so as to raise the presumption of death of defendant Niccoli before the expiration of the statutory period fixed by subdivision 26 of section 1963 of the Code of Civil Procedure, the order of the court below will not be disturbed.

[4, 5] The burden of proof herein was upon appellant to establish by competent evidence a satisfactory excuse for the defendant Niccoli's failure to appear for trial. Recognizing that obligation, appellant offered evidence to prove that the defendant was dead. The proof offered consisted wholly of circumstantial evidence. The presumption of life for seven years after

one's disappearance is not exclusive. The presumption is rebuttable and may be rebutted by evidence, direct or circumstantial, which establishes to the satisfaction of the court that the disappearance, except because of death, was without motive and inconsistent with the very nature of the person. Lesser v. New York Life Ins. Co., 53 Cal.App. 236, 239, 200 P. 22, 23; Western Grain & Sugar Products Co. v. Pillsbury, 173 Cal. 135, 139, 159 P. 423.

[6] In the Lesser case, supra, the court observes, "however, if the person at the time he was last seen was a fugitive from justice, was a bankrupt, or from other causes it would be improbable that he would be heard from even though alive, then no inference of death will be drawn. Such was the conclusion of the court in (citing cases)".

[7, 8] Bearing in mind the rule enunciated in the Lesser case, supra, that where a motive exists or doubt as to the reason for disappearance exists, the presumption of continued existence will not be shortened, we find in the record testimony produced by appellant that defendant Niccoli had been convicted of a crime in another jurisdiction; that he had been indicted for a felony in California; that he had no regular employment; that he was "continually complaining about being broke, he didn't have money, wasn't doing anything", although possessed of apparent means of obtaining money to meet pressing financial demands upon him by borrowing from friends. The record further reflects that the labels had been removed from his clothing; that his automobile was without license plates; that defendant was a member of a party of friends of Michael Cohen upon whom a murderous assault was made, resulting in the killing of one member of the party and the wounding of Cohen and two other guests

[9] However, appellant's contentions are not without merit. The record presents one of those cases that could reasonably have been decided either way. Indeed, the finding of Niccoli's keys in the location where they were discovered is difficult to explain on any basis other than that contended for by appellant. But, as noted above, the question of fact was for the trial court and even though there is room for a difference of opinion, the judgment of an appellate tribunal cannot be substituted in such circumstances for the conclusion reached by the duly constituted arbiter of the facts.

[10] In connection with the appellant's contention that "the uncontradicted evidence contained in the record of this case so strongly points to the fact of death that no other conclusion can logically be reached", it must be remembered that there are exceptions to the general rule that the uncontradicted testimony of a witness to a particular fact is binding on the court. People v. Kersten, 60 Cal.App.2d 624, 626, 141 P.2d 512. In the case now under consideration we find that the witness Michael Cohen was a guarantor on defendant Niccoli's bail bond for $50,000. Other witnesses included the mother and sister of defendant, employees of the aforesaid Cohen, friends of the defendant, one of whom had been convicted of a felony. The court was entitled to weigh their testimony in the light that they could have had a direct or indirect interest in the determination of the question as to defendant's status as living or dead.

The only other witnesses were police officers who testified as to the failure to locate the defendant; two acquaintances who testified that the defendant broke an appointment with them on September 1, 1949; persons who testified that the defendant had sent money orders and that the same had been received; employees of the City of Los Angeles who testified as to the finding of the automobile keys; and a special agent of the Pacific Telephone and Telegraph Company who supplied evidence as to a telephone call made by the defendant under an assumed name.

For the foregoing reasons we are satisfied that the order appealed from is not so plainly erroneous as to amount to an abuse of discretion, and should, therefore, be affirmed. It is so ordered.

DORAN and DRAPEAU, JJ., concur.

BECK v. WEST COAST LIFE INS. CO. et al.

Civ. 14493.

District Court of Appeal, First District, Division 1, California.

March 15, 1951.

Rehearing Denied April 14, 1951.

Hearing Granted May 10, 1951.*

Action by Herbert Beck, administrator of the estate of Lila Loly Downey, deceased, against the West Coast Life Insurance Company, and others, to recover the proceeds of a life insurance policy issued by defendant on the life of Lila Downey, in which action Jettie Knoll was granted leave to intervene as a party plaintiff. The Superior Court, San Francisco County, Daniel R. Shoemaker, J., granted Jettie Knoll's motion for judgment on the pleadings as against Herbert Beck, and Herbert Beck appealed. The District Court of Appeal, Peters, P. J., held that when a person had been convicted and sentenced to a life term, except as specifically limited by Pen.Code, §§ 2601 and 2603, civil death was to be regarded as having the same legal effect as physical death.

Affirmed.

1. Insurance ⚿448

In the absence of a statute so providing, the beneficiary of an insurance policy who murders the insured cannot take under the policy.

2. Convicts ⚿1

Under statutes pertaining to civil death of person sentenced to life imprisonment, civil death has the same legal effect as physical death, except as to the prisoner's competency as a witness and ability to make a will or convey or sell property. Pen.Code, §§ 2601, 2603.

3. Convicts ⚿3
Insurance ⚿448

Where life policy designated deceased's husband as beneficiary, if "living," otherwise to alternative beneficiary, husband by reason of murder of deceased was not entitled to proceeds of policy, and husband, imprisoned for life, was civilly dead, and alternative beneficiary rather than deceased's estate was entitled to proceeds of policy. Pen.Code, §§ 2601, 2603.

See publication Words and Phrases, for other judicial constructions and definitions of "Living".

4. Insurance ⚿585(4)

Where clause of life insurance policy designated deceased's husband as beneficiary, if living, otherwise to alternative beneficiary, and words "if living" were interpreted to mean if civilly living or physically living, construction did not result in making a new policy for the parties. Pen. Code, §§ 2601, 2603.

5. Evidence ⚿450(5)
Insurance ⚿668(14)

Where life policy designated deceased's husband as beneficiary, if living, otherwise to alternative beneficiary, the terms of the policy were clear and unambiguous and evidence could not be admitted to vary those terms and court properly interpreted terms as question of law.

◆

Chas. I. Rosin, Los Angeles, for appellant.

Paul Friedman, San Francisco, for plaintiff in intervention and respondent.

PETERS, Presiding Justice.

When a husband who, "if living," is made the beneficiary of a life insurance policy on the life of his wife, is convicted of murdering his wife, as between the estate of the murdered woman and the alternative beneficiary named in the policy, who is entitled to the proceeds of that policy? That is the question presented on this appeal.

Herbert Beck, as the administrator of the estate of Lila Loly Downey, brought this action against the West Coast Life Insurance Company to recover the proceeds of a life policy admittedly issued by the West Coast on the life of Lila. By the terms of that policy the husband of the insured, David Albert Downey, was made beneficiary "if living, otherwise to Jettie Knoll—Friend." The complaint alleges that Lila was murdered by her husband; that the husband has been convicted of the murder and has been sentenced to life imprisonment; that by reason of the murder David Downey is not entitled to the proceeds of the policy, and that the alternative beneficiary Jettie Knoll is not entitled because David is still living; that under such circumstances the estate of Lila is entitled to the proceeds.

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* Subsequent opinion 241 P.2d 544.

Jettie Knoll was granted leave to intervene in the controversy. She alleges that David, having been convicted of the murder of his wife and sentenced to life imprisonment, is legally dead, and that, under such circumstances, she, as the alternative beneficiary, is entitled to the proceeds of the policy as against the insurance company and the administrator of Lila.

The insurance company has defended against both claims, alleging that the cause of death was not within the terms of the policy, and that the policy is null and void by reason of the fraud of David in securing the policy. The issues presented by the pleadings of the insurance company have not yet been passed upon and are not now before us.

After Beck, as administrator, had filed an answer to the complaint in intervention, alleging that Jettie Knoll cannot take as long as David is alive, Jettie Knoll moved for judgment on the pleadings as against the claims of Beck. The trial court granted the motion, holding that, as against Beck, Jettie Knoll is entitled to the proceeds of the policy, and that the action should proceed with Jettie Knoll as sole plaintiff against West Coast Life Insurance Company as defendant. Beck appeals, and that is the appeal now before us.

The basic contention of Beck is that since Jettie Knoll is entitled to take under the terms of the policy only if David Downey is not living, and since the pleadings disclose that David is living, the proceeds must be paid to the estate of the assured just as if no alternative beneficiary had been named in the policy. Appellant refers to the well settled rule that the language of a contract, if clear and explicit, must govern, and to the rule that the courts are without power to make a new contract for the parties if the contract is explicit, and urges that here the contract is clear and unambiguous, and that under its terms the alternative beneficiary cannot take if the named beneficiary is living.

[1] It is well settled in practically all jurisdictions, including California, that, even in the absence of a statute so providing, a beneficiary of an insurance policy who murders the assured cannot take under the policy. Meyer v. Johnson, 115 Cal.App. 646, 2 P.2d 456; West Coast Life Ins. Co. v. Crawford, 58 Cal.App.2d 771, 138 P.2d 384. This rule is predicated upon sound public policy. It therefore follows that David Albert Downey has no interest in the proceeds of the policy.

By virtue of the life sentence for the murder of his wife, David Downey is civilly dead. Penal Code section 2601 (based upon former Penal Code section 674) provides in part: "A person sentenced to imprisonment in the State prison for life is thereafter deemed civilly dead. * * *" Penal Code section 2603 (based upon former Penal Code section 675) provides: "The provisions of the last three preceding sections must not be construed to render the persons therein mentioned incompetent as witnesses by affidavit or deposition in a civil case or proceeding or by affidavit or deposition or personally in a criminal case or proceeding, or incapable of making a will, or incapable of making and acknowledging, a sale or conveyance of property."

[2] Under these sections when a person has been convicted and sentenced to a life term the courts, except as specifically limited in the section, have treated civil death as having the same legal effect as physical death. Thus in Re Estate of Donnelly, 125 Cal. 417, 58 P. 61, the facts were that Thomas Donnelly died intestate, leaving a widow and four children, or their successors. One of the sons, James Donnelly, was under a life sentence. The court distributed the estate to the widow and successors in interest of the other three children. James, while under the

life sentence, assigned his interest in the estate to Stilwell. The latter claimed an interest in the estate of Thomas by virtue of the assignment. The Supreme Court, in affirming a holding that the assignment vested nothing in Stilwell, stated, 125 Cal. at page 419, 58 P. at page 61: "If James had died a natural death at the time he was sentenced to imprisonment in the state prison for the term of his natural life, the correctness of the decree would be unquestioned, and for the purpose of any right of inheritance his civil death must have the same effect."

In Matter of the Estate of Nerac, 35 Cal. 392, the court stated at page 396: "If the convict be sentenced for life, he becomes *civiliter mortuus,* or dead in law, in respect to his estate, as if he was dead in fact."

It is also perfectly clear, in this state, that a murderer may not inherit from or through his victim. This is governed by statute. Section 258 of the Probate Code provides: "No person convicted of the murder of the decedent shall be entitled to succeed to any portion of the estate; but the portion thereof to which he would otherwise be entitled to succeed goes to the other persons entitled thereto under the provisions of this chapter." See West Coast Life Ins. Co. v. Crawford, 58 Cal. App.2d 771, 138 P.2d 384. In some respects the interest of a beneficiary under an insurance policy is similar to that of a legatee under a will. Grimm v. Grimm, 26 Cal.2d 173, 157 P.2d 841. However, this is not always true. See Turner v. Metropolitan Life Ins. Co., 56 Cal.App.2d 862, 133 P.2d 859. We are not inclined to base our decision upon the analogy of the Probate Code section, but predicate our opinion simply upon the terms of the insurance contract and the Penal Code sections heretofore quoted.

[3] Here the proceeds of the policy were to go to Jettie Knoll if the prior named beneficiary was not "living." The prior named beneficiary is disqualified from taking and is civilly dead. While civil death is not identical with physical death in all respects, so far as the problem here presented is concerned there is no legal difference between the two. None of the cases cited by appellant suggests, far less compels, a contrary holding. While we have been cited to no case where the precise point here involved has been passed upon, what authorities that do exist strongly support the contention that when the murderer cannot take, even though still alive, the alternative beneficiary of the policy takes in preference to the estate of the victim. Vance on Insurance states the general rule as follows at page 599: "While the felonious act of the beneficiary will defeat his rights under the policy, it will not ordinarily extinguish the obligation of the insurer, unless it is so stipulated in the policy. If the contract involved is issued by a mutual benefit society, there is usually to be found in the charter or by-laws of the society, or in the statutes applicable, some provision for alternative beneficiaries in case the original designation fails. In such cases the courts easily determine that the disqualification of the felonious beneficiary qualifies the substitute, who is entitled to receive the insurance money."

The case of Metropolitan Life Ins. Co. v. McDavid, D.C., 39 F.Supp. 228, 229, is somewhat similar to the present case. In that case a husband and wife were the holders of a group life policy payable "to the wife or husband, if living, of such employee; if not living" to certain alternative beneficiaries. The wife murdered her husband. The mother of the deceased was the closest alternative beneficiary. The contest over the proceeds was between the murderess wife, the administrator of the deceased, and the alternative beneficiary, the mother. The court held that the "rights of the parties shall be determined exactly as they would have been if Beatrice McDavid [the murderess beneficiary] had died prior to the death of her husband". 39 F.Supp. at page 233. The proceeds of the policy were therefore given to the mother of the deceased, the alternative beneficiary. Unfortunately, the court did not specifically discuss the meaning of the words "if living" in the beneficiary clause, but it is quite clear that the court believed that civil death, so far as this clause was concerned, was the equivalent of legal death. See, also, Equitable Life Assur. Soc. v. Weightman, 61 Okl. 106, 160 P. 629, L.R.A.1917B, 1210; Sharpless v. Grand Lodge A. O. U. W., 135 Minn. 35, 159 N.W. 1086, L.R.A. 1917B, 670; 49 Harvard Law Rev. 715.

The parties also discuss section 189 of the Restatement of Restitution. Comment (a) on subsection (1) to that section reads: "If the beneficiary of a life insurance policy murders the insured, he is not entitled to receive and to keep the proceeds of the policy. In such a case, *ordinarily* the executor or administrator of the insured is entitled to receive the proceeds of the policy from the insurer and to apply them in the same way in which they would have been applicable if the beneficiary had predeceased the insured or was otherwise incapable of taking or disqualified from taking the proceeds. *Ordinarily* the proceeds would be applicable to the payment of the debts of the insured, and after payment of his debts would be payable to his residuary legatee, if any, and if none, to his next of kin."

Of course this section does not directly discuss the rights between an alternative beneficiary and the estate of the victim. In the McDavid case, supra, the court interpreted the word "ordinarily" in the comment to mean in the event no alternative beneficiary was named. We think that this was a proper construction.

[4] This construction of the policy does not, as contended by appellant, result in this court making a new policy for the parties. Once it is determined that for the purpose of ascertaining who is entitled to the proceeds of a life insurance policy civil death is the equivalent of physical death, the words "if living" must be interpreted to mean if civilly living or physically living. Such a construction, obviously, gives effect to what would have been the obvious intent of the assured had the problem been specifically presented to her.

[5] Appellant also contends that the trial court should not have interpreted the policy as a matter of law on a motion for judgment on the pleadings, but should have awaited trial so that evidence might be admitted to explain the language used in the policy. While parol evidence may be admitted to explain an ambiguity, that exception to the rule does not permit parol evidence to vary the terms of a written instrument. No contention is made that any evidence on the issue of intent is available to appellant. Here the terms of the policy are clear and unambiguous. That being so, the court properly interpreted these terms as a question of law.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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103 Cal.App.2d 60

PEOPLE v. BLANKENSHIP.

Cr. 4527.

District Court of Appeal, Second District,
Division 2, California.
March 23, 1951.

Hearing Denied April 19, 1951.

William Charles Blankenship was convicted in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., on one count of assault with intent to commit rape and on three other counts for forcible rape, and he appealed. The District Court of Appeal, Wilson, J., held that the evidence sustained the convictions.

Affirmed.

1. Indictment and information 🔑154

Where facts stated in information do not constitute public offense, objection is not waived by failure to demur.

2. Indictment and information 🔑59

Information is sufficient if it contains, in substance, statement that accused has committed some public offense therein specified. Pen.Code, §§ 261, 952.

3. Indictment and information 🔑110(6)

Information charging defendant, in language of statute, with crime of assault with intent to commit rape was sufficient. Pen.Code, §§ 220, 261, 952.

4. Rape ⚿16(4)

Fact that alleged victim of assault with intent to commit rape had consented to being photographed in state of undress by police officers when officers requested it, presumably for use as evidence, did not indicate her consent to acts of defendant, considering officers' position of authority and her mental state at time photograph was made. Pen.Code, §§ 220, 261.

5. Rape ⚿53(2)

Conviction for assault with intent to commit rape was sustained by evidence. Pen.Code, §§ 220, 261, 952.

6. Criminal law ⚿1032(7)

In prosecution for forcible rape, defendant waived his right to object to alleged variance between pleading and proof by failing to raise objection in trial court. Pen.Code, § 261, subds. 3, 4, § 952.

7. Rape ⚿11

Where victim of alleged forcible rape had been struck on head by defendant hard enough to cause bleeding, fact that, after he had shoved her onto bed, she had offered no further resistance did not signify consent to defendant's act, since submission induced by fear is not acquiescence, and it is primarily for woman who is attacked to decide to what extent, if at all, she can safely resist. Pen.Code, § 261, subds. 3, 4.

8. Rape ⚿51(4)

Convictions for forcible rape were sustained by evidence. Pen.Code, § 261, subds. 3, 4.

9. Rape ⚿1

Under section of Penal Code regarding criminal offense of rape, but one punishable offense of rape results from single act of intercourse, even though that act may be accomplished under more than one of conditions or circumstances specified in subdivisions of that Penal Code section, and those subdivisions merely define circumstances under which acts of intercourse may be deemed act of rape and are not to be construed as creating several offenses of rape based upon that single act. Pen. Code, § 261.

10. Constitutional law ⚿265
Rape ⚿35(4)

In rape prosecution, regardless of Penal Code subsection referred to in information, if evidence brings case within any of subsections of Penal Code section defining offense, offense of rape has been proved by prosecution, and there is no violation of rights under due process clause of Fourteenth Amendment where defendant is charged with violation of one subsection and convicted of offense under another subsection. Pen.Code, § 261; U.S.C.A. Const.Amend. 14.

Morris Lavine, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Defendant was charged by information with ten felony counts arising out of assaults on four women and with a prior conviction of attempted kidnapping. He admitted the prior conviction and after trial before the court without a jury he was found guilty of counts IV, VI, VII and VIII. The other six counts were dismissed. Defendant's motion for new trial was denied and he was sentenced to the state prison for the term prescribed by law. He has appealed from the judgment and "orders."

As grounds for reversal defendant contends: (1) Count VII of the amended information fails to state a public offense; (2) the evidence is insufficient as to the convictions on each count; (3) the convictions as to counts IV, VII and VIII are contrary to law due to a variance between pleading and proof; (4) his rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States have been violated.

Count VII

In count VII of the amended information defendant was charged with the crime of "assault with intent to commit rape" in that he did "willfully, unlawfully and feloniously make an assault upon ———

[naming her] a female person not then and there the wife of said William C. Blankenship, with the intent then and there and by force and violence to have and accomplish an act of sexual intercourse with and upon said ————." Defendant contends the information is insufficient to charge him with the offense of assault with intent to commit rape because the type of rape alleged to have been committed is that specified under subdivision 3 of section 261 of the Penal Code and there is no allegation that "she resisted but the resistance was intended to be overcome by force and violence."

[1] Although defendant did not demur or otherwise object to the sufficiency of the information in the trial court and raises the question for the first time on appeal, if the facts stated in the information do not constitute a public offense the objection is not waived by his failure to demur. People v. Nelson, 58 Cal. 104, 107; People v. Schoeller, 96 Cal.App.2d 61, 62, 214 P.2d 565; People v. Schiaffino, 73 Cal.App. 357, 359, 238 P. 725; People v. McKean, 76 Cal.App. 114, 116, 243 P. 898.

[2] An information is sufficient if it contains in substance a statement that the accused has committed some public offense therein specified. "It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." Penal Code, sec. 952. In People v. Girr, 53 Cal. 629, an indictment charging that the defendant "did willfully, feloniously, and of his malice aforethought commit an assault upon the person of ———— [named] with intent her, the said ———— [named] then and there to rape" was held to be sufficient. In People v. Estrada, 53 Cal. 600, it was held that in an indictment for assault with intent to commit rape it was not necessary to allege that the person assaulted was not the wife of defendant; that the question of intent with which the assault was committed is a question of fact and if there is evidence tending to prove the intent was as alleged in the indictment, the verdict will not be set aside on the ground the evidence is insufficient to sustain it. In People v. Burns, 63 Cal. 614, defendant was accused by information of feloniously and burglariously entering a certain house with intent to commit rape. Objection was made that the information did not state under which set of circumstances specified in section 261 the act was intended by the defendant to be accomplished. The information was held to be sufficient.

[3] Defendant was not charged under section 261 with the crime of rape but was charged under section 220 of the Penal Code which provides: "Every person who assaults another with intent to commit rape" is punishable as therein specified. The offense is not described. Since the charge is in the language of the statute the information is sufficient.

The events which preceded the alleged assault are as follows: The prosecutrix had advertised for work at home, stating in the advertisement that she was desperately in need of employment. Upon her return home after a short absence her husband informed her a Mr. Al Anderson had telephoned and left a number for her to call. She called the number and talked to a person who identified himself as Al Anderson. He told her he needed help immediately and described the type of work which was cutting stencils and mimeograph work. He told her the rate of pay and urged her to start work at once. He also asked her if she were married and if she were attractive. He then made arrangements to meet her at the corner of Figueroa and Washington Boulevard at 8:30 that evening. About five minutes after 9:00 defendant drove up and identified himself as Al Anderson. The prosecutrix got into the car and they drove away. He did not state where they were going but in their telephone conversation he had told her it was some distance out of town and he would furnish the transportation. After they had driven for some time they came to a small town. Defendant appeared surprised and said, "This looks like San Pedro. If it is we have driven miles farther than we should have." He then drove into a filling station and asked for directions. They drove on, going uphill, and finally got onto a bad road. Defendant told the prosecutrix they were going to his ranch and the roads were bad. They turned off into a little road and after driving for several minutes defendant stopped the car and said, "This is it." She asked him, "What do you mean, this is it?" Defendant replied, "Just what I said, this is it." He swung around and in his left hand she saw a knife blade. She begged him not to hurt her and he said, "I am not going to hurt you, do as I say and you will not get hurt." He told her to get into the back seat. She reached for the door and he said, "Don't reach for that door," and brought the knife practically in front of her face. She asked him what he wanted her to do and he said, "Crawl over the seat." She got into the back seat because he was armed and she was not and she thought it would be useless to fight. Defendant got into the back seat at the same time and told her to take off her clothes. She tried to "stall" and offered him money which he refused. At that time she told him to put away the knife and he did so. She had all her clothes off with the exception of her pants when police officers arrived and flashed lights into the car. She tried to open the door but could not find the door handle. She told defendant he had better open the door and then a policeman opened the door and flashed a light in her face and asked what was going on in there. She grabbed the officer by the arm and said, "Save me, get me out of here." He asked her if the man had brought her there against her will and she said, "Yes," and jumped out of the car and ran to the police car and got into the back seat.

Defendant's contention that the evidence is insufficient is upon the ground there was no resistance shown upon the part of the prosecutrix. He points to the long drive out into the wilderness, their stopping, and finally parking out on a lonely road and the fact that she undressed and that she allowed herself to be photographed by the police officers with only her pants and brassiere on as proof of her lack of resistance.

[4, 5] Such evidence when considered with that hereinabove related supports a finding that defendant assaulted the prosecutrix with the intention of committing rape and with the intention of overcoming her resistance with force and violence. He answered her advertisement and knew she was in need of work. He offered her employment and told her it was outside Los Angeles and he would furnish transportation. He told her she was to work at his ranch and it was not until he stopped and swung around with a knife blade in his hand, stating, "This is it," that she knew something was wrong. He told her to get into the back seat and that he would not hurt her if she did as he told her to do. She offered him her coin purse and he refused to take it. He told her to take off her clothes and he got into the back seat with her and removed his trousers. This evidence does not indicate consent but that the victim was afraid to offer resistance because defendant threatened her with a knife; that she removed her clothing not willingly but because she was afraid to refrain from doing so. Insofar as the picture is concerned, she consented to have it taken in a state of undress because the officers requested it, presumably for use as evidence. Considering their position of authority and her mental state at the time it does not indicate her consent to the acts of defendant.

Count IV

————, a housewife, was at home alone on November 2, 1949, between 2:00 and 2:15 in the afternoon when a man, whom she positively identified as defendant, rang her doorbell and inquired concerning the purchase of her house which was for sale. He was alone and told her he would like to look through the house. She brought him into the house and showed him through the various rooms. He then asked to see her title papers. She went to her linen closet to obtain them and reached in the lower shelf. As she rose up she felt a blow on the head and automatically screamed. Defendant put his left arm around her, holding her shoulders in front and his right hand over her mouth and said, "If you scream I will kill you." He took his hand away from her mouth and she said, "I am not going to scream, what are you going to do?" Defendant said, "You get on the bed and I won't hurt you." She put her hands to the top of her head and when she took them down they were bloody. She was frightened. She did not know what he had hit her with and she was afraid he might kill her. Defendant, who was behind her, pushed her to the bed. When they reached the bed he turned her around and started to push her down on the bed and as he pushed her she pushed him back. He shoved her onto the bed, raised her skirt, removed her pants and shoes, unzipped his trousers and forced himself upon her. She did not try to resist at that time and when the act was completed he got up and picked an object off the dresser which appeared to her to be a lead pipe. Blood was running down her neck from the cut on her head. In addition to the blow on her head she had a cut over one eye and a blue mark on her cheek. Her mouth was badly cut inside and there was a cut below her lip.

[6] Defendant asserts that the evidence fails to prove that the prosecutrix resisted and that her resistance was overcome by force and violence; that she testified she did not resist. He admits she testified she did not resist because of threats but contends he was not charged under subdivision 4 of section 261 of the Penal Code which defines rape as an act of intercourse where the prosecutrix "is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution" but that the amended information charges him with a violation of subdivision 3 of that section defining rape as an act of intercourse where the resistance of the prosecutrix "is overcome by force or violence." Defendant waived his right to object to an alleged variance between the pleading and the proof by failing to raise the objection in the trial court. People v. Abila, 137 Cal.App. 26, 28–29, 29 P.2d 796; People v. Yachimowicz, 57 Cal.App.2d 375, 380, 134 P.2d 271. Moreover, the variance is immaterial. Regardless of the subsection referred to in the information, if the evidence brings the case within any of the subsections of section 261, the offense of rape has been proved by the prosecution. People v. Craig, 17 Cal.2d 453, 455, 110 P.2d 403; People v. Cassandras, 83 Cal.App.2d 272, 276, 188 P.2d 546.

[7, 8] That defendant used force and violence is established by the evidence. He struck the prosecutrix on the head hard enough to cause it to bleed; he inflicted other injuries on her; he grabbed her from behind and held her mouth to prevent her from screaming; when she asked him why he hit her, defendant replied, "I am sorry I hit you; I didn't mean to but most women won't give in to me;" she was afraid he would kill her; he pushed her into the bedroom and onto the bed; she pushed against him hard enough to leave blood from her hands on the lapels of his coat. The fact that after he shoved her onto the bed she offered no further resistance does not signify consent to defendant's act. A submission induced by fear is not acquiescence. It is primarily for the woman who is attacked to decide to what extent, if at all, she can safely resist. People v. Calliham, 81 Cal.App.2d 928, 931, 185 P.2d 342; People v. Lay, 66 Cal.App.2d 889, 893, 153 P.2d 379; People v. Cassandras, supra. The evidence is ample to sustain a conviction of forcible rape.

Count VI

————, an 18-year-old school girl, advertised in the paper for work as a baby sitter. Defendant came to her house between 7:00 and 8:00 in the evening and asked if she was a baby sitter and if she wanted a job. She replied that she did and he told her that his wife was sick, that he had two children and needed someone to take care of them while he took his wife to the hospital. She got in defendant's car and drove off with him. She asked him where he lived and he said in Palos Verdes. After they had driven for 10 or 15 minutes defendant turned off onto a dirt road and stopped near a fence. There were no houses in the vicinity. Defendant said, "This is where we stop; this is the end." She asked him what he meant and he said, "You know." She tried to talk him out of it. He told her to get into the back seat. She did not want to do so and he became "nasty" about it. Defendant had his hand behind his back and he had something in his hand. He told her he would hurt her unless she got into the back seat. He told her he would not hurt her if she would do as he said. She tried to get out of the car but could not find the door handle to open it. She offered to get out and walk back and he told her she was going to walk anyway. She finally got into the back seat and he told her to remove her clothes. She complied and he committed an act of intercourse.

Defendant contends that because the victim did not physically resist, because there was no scuffle, because she got into the back seat without his assistance and removed her clothes herself the evidence "fails to measure up to the language of the statute of 'threat of great and immediate bodily harm, accompanied by apparent power of execution.'" This contention is without merit. The circumstances are not unlike those in People v. Cassandras, 83 Cal.App.2d 272, 188 P.2d 546, 550, in which the court held that the "evidence shows consent induced by threats of the type contemplated by the code section" and that it was ample to sustain the conviction. In the instant case the victim was an 18-year-old school girl. It was nighttime and defendant had taken her to a secluded spot off the main highway. He told her he would hurt her unless she got into the back seat. He told her he would not hurt her if she would do what he said. When he told her he would hurt her his voice was forceful and he gave her the impression he would kill her. The evidence is sufficient to sustain the conviction.

Count VIII

——————, a school girl 14 years of age was at home when defendant came to her house and asked if she was the girl who was to baby sit for him. She said she was and her father accompanied her to defendant's car. She entered and they drove away. Defendant directed his course to some oil wells where he stopped. He told her he had to look at an oil well and left the car and went around the well. When he came back he had a knife in his hand. He told her if she did what he told her to do she would not be hurt. He told her to get into the back seat and to remove her clothes. While she was in the front seat he told her he would cut her neck from ear to ear. She told him he was crazy and he slapped her face. She got into the back seat and removed her clothes. Defendant committed an act of intercourse during which time he kept the knife in his hand. She got dressed and he put her out of the car warning her not to tell anybody or he would kill her. On the way home she found her toe had been cut.

Defendant raises the same objection as that raised with respect to count IV, namely, that he was charged in the amended information with having overcome the victim's resistance by force and violence whereas she testified that she consented due to fear of great and immediate bodily harm. This objection is without merit as has been hereinabove stated and the evidence sustains the conviction.

Defendant also challenges the evidence as to his identification. In each case the victim positively identified the defendant in addition to which there is corroborating evidence.

[9, 10] Defendant's contention that his rights under the due process clause of the Fourteenth Amendment have been violated because he was charged with one offense and convicted of another is likewise untenable. As stated in People v. Craig, 17 Cal.2d 453, 455, 110 P.2d 403, 404, under section 261 of the Penal Code "but one punishable offense of rape results from a single act of intercourse, although that act may be accomplished under more than one of the conditions or circumstances specified in the foregoing subdivisions. These subdivisions merely define the circumstances

under which an act of intercourse may be deemed an act of rape; they are not to be construed as creating several offenses of rape based upon that single act."

Judgments and order denying motion for new trial affirmed.

MOORE, P. J., and McCOMB, J., concur.

102 Cal.App.2d 884

MATZEN v. HORWITZ

Civ. 18056.

District Court of Appeal, Second District,
Division 2, California.
March 19, 1951.

Hearing Denied May 17, 1951.

Action by Warren C. Matzen against Moris Horwitz to recover damages for breach of written contract to preserve and enlarge plaintiff's practice as a specialist in diagnostic and therapeutic radiology during plaintiff's service in the Army and for unfair competition. The Superior Court of Los Angeles County, J. T. B. Warne and W. Turney Fox, JJ., entered judgment for plaintiff and an order denying a new trial and defendant appealed. The District Court of Appeal, Wilson, J., held that the evidence sustained finding that during existence of contractual relationship defendant had wilfully diverted a large portion of plaintiff's practice to his own use and benefit and that such finding supported judgment.

Appeal from order denying a new trial dismissed and judgment affirmed.

1. Appeal and error 🔑110

An appeal would not lie from order denying defendant's motion for new trial.

2. Joint adventures 🔑5(2)

Evidence sustained findings in relation to cause of action for breach of written contract to preserve and enlarge plaintiff's practice as a specialist in diagnostic and therapeutic radiology during plaintiff's service in Army that defendant after receipt of 60-day notice to terminate contract had wilfully diverted a large portion of plaintiff's practice to his own use and benefit by misusing confidential knowledge obtained regarding plaintiff's clientele and that he was able to do so only because of the contacts made with referring physicians and information gained concerning such physicians during contractual relationship.

3. Contracts 🔑168

In every contract there is an implied covenant of good faith and fair dealing and that neither contracting party will do anything to destroy or injure the rights and interests of the other party.

4. Joint adventures 🔑5(2)
Trade-marks and trade-names and unfair competition 🔑99

Finding that after receipt of 60-day notice to terminate written contract to preserve and enlarge plaintiff's practice as a specialist in diagnostic and therapeutic radiology during plaintiff's Army service defendant had wilfully diverted a large portion of plaintiff's practice to his own use and benefit by misuse of confidential knowledge regarding plaintiff's clientele and referring physicians gained during contractual relationship supported judgment for plaintiff for damages on cause of action either for breach of contract or for unfair competition.

5. Master and servant 🔑60

An employee, in absence of a contractual inhibition, may enter into competition with his former employer and solicit his customers, provided such competition is fair and legally conducted.

6. Appeal and error 🔑843(2)

Where the evidence and findings supported judgment for plaintiff on cause of action for breach of contract, defendant's contentions that cause of action for unfair competition was not supported by the record and that failure to seek equitable relief by way of injunction precluded recovery need not be considered on appeal.

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Loeb & Loeb, Herman F. Selvin, Los Angeles, for appellant.

Russell K. Lambeau, Los Angeles, for respondent.

WILSON, Justice.

[1] Action for damages for breach of contract and for unfair competition. From a judgment in favor of plaintiff defendant has appealed.[1]

Plaintiff and defendant are doctors of medicine licensed to practice in California. Each specializes in diagnostic and therapeutic radiology. For several years prior to World War II plaintiff had maintained a ten-room suite of offices. His practice consisted entirely of patients referred to him by other physicians for the purpose of diagnosis and for therapeutic treatments. He employed two secretaries and two, sometimes three, technicians who were required in the care of his patients. Upon his entry into the United States Army, to the end that his practice should continue intact so that he would be able to resume it upon his return from military service, plaintiff entered into a contract with defendant on February 15, 1943, whereby the latter went into the possession of plaintiff's office and equipment, retaining his staff of employees. The contract, which was prepared by defendant's attorney, after reciting that plaintiff was the owner of the office furniture and furnishings and was a conditional vendee of miscellaneous X-ray apparatus and equipment located in an office which he had maintained under a written lease for a term of years and that it was the plaintiff's desire that defendant carry on the practice at that office and defendant desired to use the equipment, furniture and furnishings therein, provided among other things as follows:

"5. In consideration of the matters herein and hereinafter contained the second party [defendant] agrees to devote his best talents to the maintenance and preservation of such practice and clientele now possessed by the Office and to the fostering and development of an enlarged practice and clientele, upon the following terms and conditions: * * *." Then followed provisions for the division between plaintiff and defendant of the net receipts derived from the practice and the formula by which defendant was required to account to plaintiff for the receipts and disbursements. The agreement contained a provision that either party thereto might terminate the agreement by giving to the other a sixty-day notice in writing of his intent to terminate.

Upon his separation from Army service plaintiff, desiring to return to his practice, served a written notice on defendant on January 25, 1946, that the contract would be terminated on March 31, 1946.

The court found that defendant devoted his best talents to the preservation, maintenance and enlargement of the practice and clientele of the office until on or about February 1, 1946, "but that after said date and contrary to the terms of said contract the defendant did not devote his best talents to the preservation or maintenance or enlargement of the practice or clientele of said office but on the contrary the defendant between February 1, 1946, and March 31, 1946, arranged to and did wilfully and intentionally divert away from the plaintiff a large and substantial portion of plaintiff's practice and that by reason thereof plaintiff suffered damage in the sum of $18,084.06."

The court further found that between February 1, 1946, and March 31, 1946, defendant schemed and planned to and did misuse and abuse the confidential knowledge entrusted to him concerning plaintiff's practice and clientele by prevailing upon such clientele to discontinue dealing with plaintiff and to patronize defendant; that having exerted his utmost efforts during the existence of the contract to gain the confidence of the referring doctors, employed means to accomplish his purpose as follows: (a) he solicited plaintiff's clientele of referring doctors by sending them written announcements of the opening of his office at another location; (b) during

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[1] A purported appeal was filed by defendant's former counsel from the order denying his motion for a new trial, a nonappealable order.

March, 1946, he made appointments to see at his new office patients who had been referred to plaintiff's office.

The court found that without having succeeded in making contacts with such referring doctors and without having gained information and knowledge concerning them during the existence of the contract, defendant could not have taken the business away from plaintiff; that when plaintiff resumed possession of his office on April 1, 1946, he discovered that a large portion of his practice and clientele had gone and that defendant, as the direct and proximate result of his acts above mentioned, was receiving the patronage thereof at the new office which defendant had opened for himself, in consequence of which plaintiff had suffered damage.

Defendant contends that the evidence does not sustain the findings and that the findings do not support the judgment. It is his contention that by reason of the failure of the contract to restrict him by negative covenant or otherwise in the practice of his profession on his own account after the termination of the contract he was at liberty, upon his dissociation from plaintiff's office, to take the practice with him to his new location.

[2] The finding that between February 1, 1946, and March 31, 1946, defendant planned to misuse the confidential knowledge which he had obtained regarding plaintiff's clientele is sustained by the evidence, and that he accomplished his purpose and intent of taking the business with him is well established by the uncontradicted facts. Although prior to April 1, 1946, there had been in the office an average of 500 patients a month who had been referred by other physicians, on that date when plaintiff resumed possession of his office only one appointment was on the books. During nine months after plaintiff resumed practice patients averaged 103 a month from the same sources of reference—a difference of 80 percent. Defendant took with him the secretaries and technicians who had assisted in the office and left only one employee, an inexperienced secretary.

The practice conducted by defendant after the execution of the contract consisted, as had plaintiff's practice prior thereto, of patients of other physicians who were referred by them for diagnosis or for therapeutic treatments. The average monthly profit of the office was $6300 for the first three months of 1946; plaintiff's first month's operation (April) resulted in a loss of $124.18. All therapy patients were gone.

Defendant, upon leaving plaintiff's office on April 1, 1946, simultaneously became associated with one Dr. Bailey, also a radiologist. As found by the court, he solicited the referring doctors to send their patients to him at his new location and made appointments with patients to visit him there. The loss to plaintiff and the gain to defendant by the latter's taking the business with him is indicated (1) by the absence of business in plaintiff's office above related, and (2) by the immediate increase in the practice referred to the Bailey office. In March, 1946, there were 45 referred patients in the latter office yielding $835.40 and in April and May 542 patients, providing a dollar volume of business of $16,995.-87. These patients were referred to the Bailey office by 99 of the doctors who had referred their clientele to plaintiff's office while defendant was in charge of it.

The foregoing facts, the evidence of which is undenied, show conclusively that defendant took with him to Dr. Bailey's office the practice which rightfully belonged to plaintiff. Defendant later admitted to plaintiff that he had taken the practice with him, and that while in charge of plaintiff's office he had made appointments for patients to come to Dr. Bailey's office. He said he regretted his mistake and intended to make restitution.

The evidence sustains the findings of the court that (1) defendant devoted his talents to the preservation and enlargement of the practice and clientele "of the office" until February 1, 1946, and (2) thereafter he wilfully diverted the practice from the office. The evidence shows that beginning with that date, five days after the notice of termination of the contract had been given by plaintiff, defendant's attitude changed. Among other things defendant refused plaintiff's request that he be permitted to return to the office prior to April 1, 1946, in order to familiarize himself with its details and with the practice and clientele that had come into the office during his service in the Army. Defendant's excuse for such refusal was that the office (10 rooms, 1200 square feet) was too small! Obviously he did not intend that plaintiff should have an opportunity of meeting the patients who visited the office or that the patients should know of plaintiff's existence.

With knowledge that upon plaintiff's return from the service he would terminate the contract and endeavor to re-establish his practice, defendant, while building up the practice of the office, had prepared well in advance for such eventuality. His sinister intent to appropriate the business to his own personal use and benefit developed within a short time after he took charge of the office and continued during his tenure. He attempted on more than one occasion, while plaintiff was overseas, to obtain a lease in his own name of the office on which plaintiff had had a lease for several years. Defendant naively replies that in so doing he did not violate a duty to plaintiff since he was looking forward to a time when the contract would no longer be in force and he would be free to compete with plaintiff in all respects—even to the extent of leasing plaintiff's offices from under him. Inasmuch as plaintiff had a right to terminate the contract at any time on 60 days' notice how could defendant have looked forward to a date so indefinite? In his deposition when asked with reference to building up plaintiff's practice, he answered "by that time it had become my practice. * * * I would say it was practically the second or third month I was there."

Early in 1943 defendant omitted plaintiff's name from the printed reference cards—the cards on which a record was kept of the name of each patient referred to the office by other physicians, the purpose of the reference and the name of the referring doctor. Only defendant's name appeared on such cards. The reason for such omission, according to defendant's testimony, was that a great number of physicians said they did not know who Dr. Matzen was and the witness, so he testified, was agreeable to their not knowing who he was. That such action was not according to professional standards and that defendant was apparently not interested in such standards is shown by the testimony of Dr. Bailey that when his association with defendant began his, Bailey's, name did not appear on the reference cards used by defendant; because of such omission Bailey "raised an awful fuss about it." Defendant sent out announcements of the removal of his office but he did not advise any of the patients that he preferred that they remain under plaintiff's care rather than follow defendant, nor did he advise any doctor or patient, either in his announcements or orally, that plaintiff was returning to his practice. Insofar as defendant could devise, plaintiff was nonexistent. The announcements were sent to plaintiff's clientele among the medical profession while the contract was still in force—about two weeks prior to April 1, 1946. Until that date defendant was serving plaintiff's clientele, not his own. This occurred before plaintiff had had an opportunity to obtain any information regarding the business of the office after an absence of three years.

The finding that defendant could not have taken plaintiff's business away from him unless, during the existence of the contractual relations between them, the latter had been able to make contact with the referring doctors, and to gain information and knowledge concerning such doctors, has ample support in the evidence. Prior to defendant's association with plaintiff he had been a full time employee in a Chicago hospital at a monthly salary of $350. He had remained in the same hospital ever since completing his internship. With such background and without acquaintance among the members of the medical profession in Los Angeles and Beverly Hills it is not reasonable to assume that he could by fair means have uprooted another radiologist's practice and taken for his own not only the practice but the staff of technicians. Things do not happen that way.

Defendant does not attempt to professionalize his conduct nor does he assert it was ethical. His attempted justification is based on the absence from the contract of a negative covenant restricting him from doing as he did. He contends that by reason of there being no restraining provision in the contract he was within his legal rights in appropriating the practice that had been entrusted to him by plaintiff—a practice to the maintenance and preservation of which he had solemnly agreed to devote his best talents. For whom? For himself, says defendant. Whatever may have been his intent when he signed the contract he now takes the position that he was developing an enlarged practice for himself. During the two weeks ending March 30, 1946, defendant treated 67 therapy patients. He told them of his new office but did not suggest to any of them that he preferred that they remain under plaintiff's care rather than follow defendant. Although he testified that he gave them a choice of going with him to his new location or remaining with plaintiff's office, the court evidently was not impressed with his testimony since the finding is that during February and March, 1946, defendant wilfully and intentionally diverted from plaintiff a large and substantial portion of the latter's practice. Nor was the court impressed with the theory that in radiological practice therapy patients desire continuity of service by one practitioner. Two witnesses testified that it is not in keeping with good medical practice to change doctors during a course of treatments; two expressed contradictory views, stating that such procedure is not only proper but is followed in actual practice. Since the court did not find on conflicting evidence in accordance with defendant's theory we cannot do so. It is in the record that during defendant's absence from the office on a vacation the practice proceeded without interruption, and as far as appears from the evidence without objection from the patients, in charge of another doctor who had not previously seen any one of them. Moreover, when defendant took over plaintiff's office in 1943 there was no stoppage in the references of patients and those who were then being treated by plaintiff continued under defendant's ministration.

[3] In every contract there is an implied covenant of good faith and fair dealing and that neither contracting party will do anything that will destroy or injure the rights and interests of the other party. It is not necessary that such a covenant be spelled out in order to ensure that one party will not take advantage of a situation such as that presented in this action. Defendant's course of conduct beginning at the time he said the practice had become his own, three months after he took charge of plaintiff's office, until the termination of the contract, indicates an intent and purpose on his part to convert plaintiff's well established practice to his own use and benefit.

Defendant agreed, during the term of the contract, to devote his talents to the enlargement of the practice—plaintiff's practice, of course, since that was the only matter that was the subject of the agreement. He did develop and maintain the practice but during the last two months of the term of the contract he destroyed it insofar as plaintiff is concerned by arranging to take it with him. The announcement of his removal did not state that plaintiff was returning. It merely stated defendant was moving to another location. The evidence is that his announcement was in the customary form but there is no evidence that it is regarded by the medical profession as professional or proper to send such announcements while the sender is under contract with another physician to preserve the latter's practice. He did not suggest to a single patient that he or she return to plaintiff's office after April 1, 1946. Defendant's statements to patients amounted to a solicitation that they continue their relations with him and the announcements were tacit invitations to the doctors to refer their patients to him. It was plaintiff's business that defendant was dealing with, not his own. Nor did he have any interest in the practice except a division of its proceeds according to the formula provided in the contract. Evidence of such acts, together with evidence of other conduct herein related, sustains the finding of the court that defendant wilfully and intentionally diverted a large portion of plaintiff's practice to his own use.

Although, as defendant asserts, he was not prohibited from entering practice on his individual account after the termination of his relations with plaintiff, there is no implication in the contract that not only could he take plaintiff's practice but could make arrangements to do so during the term of the contract under which he was constrained to maintain and preserve the practice and clientele for plaintiff.

The complaint as above stated seeks damages based on two separately stated causes of action: (1) breach of contract, (2) unfair competition. We have not had the difficulty that defendant professes to have had in determining on what basis the judgment was rendered. The findings are responsive respectively to each cause of action and are separately and distinctly stated. The court expressly found (Finding IV), referring to the allegations in the second cause of action, that between February 1, 1946, and March 31, 1946, defendant breached the contract in the manner hereinbefore recited. Findings V and VI relate just as expressly, separately and distinctly to the third cause of action, which contains typical allegations found in complaints for unfair competition, and particularize the acts which the court concluded constituted such unfair competition, resulting in defendant's appropriation of the business to his personal use.

[4] The findings as to either cause of action standing alone support the judgment and the evidence supports the findings with reference to the breach of contract.

[5] There is no question as to defendant's right, in the absence of an agreement on his part to refrain from engaging in radiological practice in competition with plaintiff, to have gone into business for himself upon the termination of the contract. It is therefore unnecessary to discuss the cases cited by defendant holding that an employee, in the absence of a contractual inhibition, has the right to enter into competition with his former employer, including the right to solicit persons who had been customers of such former employer. Such decisions declare that the competition must be fair and must be legally conducted. An example of cases so holding is Continental Car-Na-Var Corp. v. Moseley, 24 Cal.2d 104, 148 P.2d 9. The Continental case and the several other decisions that defendant cites have nothing to do with the cause of action for breach of contract. They relate to the charges of unfair competition.

[6] Since the evidence and the findings support the judgment on the cause of action alleging breach of the contract, defendant's contention that the third cause of action is not supported by the record need not be considered. Gudger v. Manton, 21 Cal.2d 537, 544, 134 P.2d 217; Shultz v. Redondo Improvement Co., 156 Cal. 439, 441, 105 P. 118.

Defendant maintains that plaintiff is not entitled to recover damages because he did not seek equitable relief—an injunction to restrain defendant's misuse of the confidential information acquired by him regarding plaintiff's practice. Such contention has reference to the third cause of action and for the reasons above stated need not be considered.

Judgment affirmed. Appeal from order denying motion for new trial dismissed.

MOORE, P. J., and McCOMB, J., concur.

MEFFORD v. CITY OF TULARE et al.

Civ. 4078.

District Court of Appeal, Fourth District, California.

March 19, 1951.

Rehearing Denied April 12, 1951.

Hearing Denied May 17, 1951.

Action by O. F. Mefford against the City of Tulare, a municipal corporation, and others, for declaratory relief to test the validity of a city ordinance. The Superior Court, Tulare County, Frank Lamberson, J., rendered judgment for plaintiff, and the defendants appealed. The District Court of Appeal, Mussell, J., held that the ordinance was within initiative powers of city's electorate.

Judgment reversed.

1. Declaratory judgment ⚷2

Purpose of declaratory relief is to liquidate uncertainties and controversies which might result in future litigation. Code Civ.Proc. § 1060.

2. Declaratory judgment ⚷5

Whether a determination is proper, in an action for declaratory relief, is a matter within the trial court's discretion. Code Civ.Proc. § 1060.

3. Declaratory judgment ⚷394

Unless trial court has clearly abused its discretion by making determination in an action for declaratory judgment relief, its decision will not be disturbed on appeal. Code Civ.Proc. § 1060.

4. Declaratory judgment ⚷315

Complaint alleging that plaintiff was desirous of subdividing and improving his tract of land, that city refused to provide water and sewer facilities by any procedure except that prescribed by an ordinance, and that city upheld and asserted validity of ordinance, and that an actual controversy existed between parties, stated a cause of action for declaratory relief. Code Civ. Proc. § 1060.

5. Declaratory judgment ⚷128

Where plaintiff who owned a tract of land in city alleged that city refused to provide water and sewer facilities by any procedure except that prescribed by an ordinance requiring subdivider to furnish a profile map for approval of city engineering department, plaintiff was entitled to declaratory relief, even though he failed to file tentative subdivision map or took steps to comply with ordinance. Code Civ.Proc. § 1060.

6. Declaratory judgment ⚷43

Remedies in statute providing for declaratory relief are cumulative and declaratory relief may be asked alone or with other relief. Code Civ.Proc. §§ 1060–1062.

7. Municipal corporations ⚷108.2

Enactment of initiative ordinance regulating installation of water and sewage facilities in subdivision was a valid exercise of initiative powers of city electorate in absence of charter restriction or limitation on passage of such ordinance. Business and Professions Code, § 11500 et seq.; Const. art. 4, § 1; art. 11, § 6.

8. Municipal corporations ⚷58

City charter operates not as a grant of power, but as an instrument of limitation and restriction on exercise of power over all municipal affairs which city is assumed to possess, and enumeration of powers does not constitute an exclusion or limitation. Const. art. 4, § 1; art. 11, § 6.

9. Municipal corporations ⚷64

In respect to municipal affairs, city is not subject to general law except as charter may provide. Const. art. 4, § 1; art. 11, § 6.

10. Municipal corporations ⚷58

In construing city's charter, a restriction on exercise of municipal power may not be implied. Const. art. 4, § 1; art. 11, § 6.

11. Municipal corporations ⚷270, 271

The regulation of sewer and water facilities within a chartered city are "municipal affairs" within constitutional provision that chartered cities are empowered to make and enforce all laws and regulations in respect to municipal affairs, subject only to charter restrictions and limitations. Const. art. 11, § 6.

See publication Words and Phrases, for other judicial constructions and definitions of "Municipal Affairs".

12. Municipal corporations 🔑**43, 111(1)**

Under Subdivision Map Act containing numerous references to ordinances which may be enacted, and indicating that such ordinances would be used to supplement act itself, and providing that design, improvement and survey data of subdivisions and final maps thereof, and procedure to be followed in securing official approval are governed by provisions of chapter and by additional provisions of local ordinances dealing with subdivisions, legislature intended to authorize enactment of local ordinances, and therefore ordinance requiring subdividers to furnish profile map for approval, was not contrary thereto. Business and Professions Code, §§ 11500–11628.

13. Municipal corporations 🔑**43**

Where there is no specific limitation in charter on city's power to impose conditions in approving subdivision map and none in Subdivision Map Act or city ordinances, conditions are lawful if not inconsistent with act and ordinances, and if reasonably required by subdivision type and use as related to character of local and neighborhood planning and traffic conditions. Business and Professions Code, §§ 11500–11628.

14. Municipal corporations 🔑**43**

Subdivision Map Act by its provisions indicates legislative intention that action of cities in making requirements for submitting of map by subdividers to city for approval, prior to subdivision, would be "legislative action" rather than administrative or executive action. Business and Professions Code, §§ 11500–11628.

See publication Words and Phrases, for other judicial constructions and definitions of "Legislative Action".

15. Constitutional law 🔑**50**

Acts constituting a declaration of public purpose, and making provision for ways and means of its accomplishment, may be generally classified as calling for exercise of "legislative power".

See publication Words and Phrases, for other judicial constructions and definitions of "Legislative Power".

16. Administrative law and procedure 🔑**204**
Constitutional law 🔑**76**

Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by legislative body, or such as are devolved upon it by organic law of its existence.

17. Municipal corporations 🔑**108.8**

City ordinance requiring subdividers to furnish a profile map for approval by city engineering department and providing that subdividers shall furnish and install their own sewer and water facilities within boundaries of subdivision at expense of owner or subdivider, in accordance with plans approved by city engineer, constituted a declaration of public purpose and provision for ways and means of its accomplishment, and dealt with "legislative matters" and could therefore be legally adopted by initiative procedure. Business and Professions Code, §§ 11500–11628.

◆

Maddox & Abercrombie and Erling H. Kloster, all of Visalia, and John R. Berryhill, Tulare, for appellants.

Harold D. Mefford, Hayward, for respondent.

MUSSELL, Justice.

Action for declaratory relief.

Plaintiff, as owner of a 38 acre tract of land in the city of Tulare, brought the instant action, under the declaratory relief provisions of section 1060 of the Code of Civil Procedure, to test the validity of a city ordinance, which, insofar as here material, provides as follows: "Subdividers of any acreage now or hereafter subdivided shall be required to furnish Profile Map, showing proposed subdivision drainage, etc., for approval of City Engineering Department as to good engineering practice, and shall furnish and install their own sewer and water facilities within the boundaries of the subdivision at the expense of the owner or subdivider. Such installations shall be made in accordance with plans approved by the City Engineer, and subject to inspection by the City before acceptance of the project for maintenance by the City."

There is no dispute as to the material facts. The city of Tulare has been a charter city since 1923 and in February, 1949, the registered voters thereof voted upon and passed the ordinance in question (No. 572). This ordinance had been proposed by way of an initiative petition. Plaintiff filed no tentative subdivision map with any city official or board and had taken no affirmative action to comply with the ordinance or the Subdivision Map Act (Division 4, Part 2, Chapter 2 of the Business and Professions Code).

Plaintiff alleged in his complaint, among other things, that he was "desirous of subdividing and improving" his tract, but that "the defendants will refuse to provide water and sewer facilities for said real property by any procedure except that prescribed by said ordinance, and that defendants uphold and assert the validity of said ordinance." It is alleged that by reason of these facts that an "actual controversy" existed between the parties. It is further alleged that the ordinance is void in that it was adopted without appropriate power in the electorate of the city to enact such an ordinance by an initiative measure.

The trial court concluded that plaintiff was entitled to declaratory relief and that ordinance No. 572 of the city of Tulare was adopted as an initiative measure without appropriate power in the electors of the city. Judgment was awarded in favor of plaintiff, decreeing that the questioned ordinance was null and void as against the plaintiff and that the defendants be restrained and enjoined from enforcing it against him.

Defendants appeal from the judgment, contending that (1) The case is not a proper one for declaratory relief; and (2) That the ordinance involved is a valid exercise of the initiative powers of the electorate. We cannot agree with appellants' first contention.

[1-6] The purpose of declaratory relief is to liquidate uncertainties and controversies which might result in future litigation and whether a determination is proper in an action for declaratory relief is a matter within the trial court's discretion. Unless a clear abuse of discretion is shown, the trial court's decision will not be disturbed on appeal. Hannula v. Hacienda Homes, Inc., 34 Cal.2d 442, 448, 211 P.2d 302. As was said in Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 729, 146 P.2d 673, 678, 151 A.L.R. 1062: "The purpose of a declaratory [relief] judgment is to 'serve some practical end in quieting or stabilizing an uncertain or disputed jural relation.'" (Citing cases.) The complaint herein states a cause of action for declaratory relief under the rules announced in the foregoing decisions. The relief sought by plaintiff is available to him even though he failed to file a tentative subdivision map or take steps to comply with the ordinance. This is so because it does not appear that such action would have been speedy and adequate or so well suited to plaintiff's needs as declaratory relief. The remedies provided by the statute are cumulative and declaratory relief may be asked alone or with other relief. Code Civ.Proc. secs. 1060-1062; Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 761, 161 P.2d 217, 162 A.L.R. 747.

[7] The remaining material question before us is whether or not the ordinance involved is within the initiative powers of the electorate of the city of Tulare. Our conclusion is that the enactment of the ordinance was and is a valid exercise of such powers and that the trial court erred in decreeing it to be null and void.

Article IV, Section 1 of the California Constitution reserves to the people of the state the initiative power and also reserves such powers to cities and counties in the following language: "The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the State to be exercised under such procedure as may be provided by law. * * * Nothing contained in this section shall be construed as affecting or limiting the present or future powers of cities or cities and counties having charters adopted under the provisions of Section 8 of Article XI of this Constitution."

The Constitution further provides that chartered cities are empowered "* * * to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to [all] other matters they shall be subject to and controlled by general laws. * * *" (Article XI, sec. 6, California Constitution.)

[8–10] As was said in City of Grass Valley v. Walkinshaw, 34 Cal.2d 595, 598, 599, 212 P.2d 894, 896: "The charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation. West Coast Advertising Co. v. San Francisco, 14 Cal.2d 516, 521–522, 525, 95 P.2d 138, and cases cited; City of Oakland v. Williams, 15 Cal.2d 542, 550, 103 P.2d 168; City and County of San Francisco v. Boyd, 17 Cal.2d 606, 617–618, 110 P.2d 1036; Kennedy v. Ross, 28 Cal.2d 569, 575, 170 P.2d 904; Ayres v. City Council of Los Angeles [ante], 34 Cal.2d at pages 31, 37, 207 P.2d 1 [11 A.L.R.2d 503]. Thus in respect to municipal affairs the city is not subject to general law except as the charter may provide. Heilbron v. Sumner, 186 Cal. 648, 650, 200 P. 409; Muehleisen v. Forward, 4 Cal.2d 17, 19, 46 P.2d 969. As recognized in the West Coast Advertising case, the levy of taxes for city purposes is a municipal affair; the collection, treatment and disposal of city sewage and the making of contracts therefor are likewise municipal affairs, Loop Lumber Co. v. Van Loben Sels, 173 Cal. 228, 232, 159 P. 600, and neither may be held to be circumscribed except as expressly limited by the charter provisions. All rules of statutory construction as applied to charter provisions, Braun, Bryant & Austin v. McGuire, 201 Cal. 134, 143, 255 P. 808; Hartford Acc[ident] [& Indem.] Co. v. City of Tulare, 30 Cal.2d 832, 835, 186 P.2d 121, are subordinate to this controlling principle. The former guide—that municipalities have only the powers conferred and those necessarily incident thereto, City and County of San Francisco v. Boyle, 195 Cal. 426, 233 P. 965—is inapplicable. A construction in favor of the exercise of the power and against the existence of any limitation or restriction thereon which is not expressly stated in the charter is clearly indicated. So guided, reason dictates that the full exercise of the power is permitted except as clearly and explicitly curtailed. Thus in construing the city's charter a restriction on the exercise of municipal power may not be implied."

[11] The ordinance before us regulates the furnishing and installation of sewer and water facilities within a chartered city. These are "municipal affairs" within the meaning of section 6, Article XI of our state constitution. Loop Lumber Co. v. Van Loben Sels, 173 Cal. 228, 232, 159 P. 600. An examination of the Tulare city charter discloses the following provisions:

"Powers. Section 3. Said city shall have and may exercise all the powers heretofore granted to the other municipalities of the state, also such as may be necessary or appropriate to a municipal corporation and to the general welfare of its corporation and to the general welfare of its inhabitants which are not prohibited by the constitution, and which it would be competent for this charter to set forth particularly or specifically, and the specification herein of any particular powers shall not be held to be exclusive."

"Section 12. Ordinances may be initiated, or the referendum applied on ordinances passed by the Council under and in accordance with the Constitution and general laws of the state * * *."

"Section 72. All general laws of the state applicable to municipal corporations, now or hereafter enacted, and which are not in conflict with the provisions of this charter or with ordinances or resolutions hereafter enacted, shall be applicable to the city."

These provisions contain no restrictions on the passage of the ordinance in question, and, in fact, refer to ordinances that may be passed in accordance with the Constitution and general laws of the state.

[12] It is contended by plaintiff that the subject ordinance is contrary to the Subdivision Map Act. Bus. & Prof.Code, secs. 11500–11628. We have examined the various provisions of the act and find no limitation therein of the power of the electorate to enact the ordinance involved. The act contains numerous references to "ordinances" which may be enacted, indicating that such ordinances would be used to supplement the act itself. Section 11526 of the Business and Professions Code provides as follows: "Provisions governing design, etc., maps and procedure. The design, improvement and survey data of subdivisions and the form and content of tentative record of survey and final maps thereof, and the procedure to be followed in securing official approval are governed by the provisions of this chapter and by the additional provisions of local ordinances dealing with subdivisions, the enactment of which is authorized by this chapter."

In section 11611 the approval of the final subdivision map is made subject in part to any local ordinance applicable. These provisions clearly indicate the legislative intent to authorize the enactment of local ordinances. In respect to municipal affairs, a city is not subject to general law except as the charter may provide. City of Grass Valley v. Walkinshaw, supra, 32 Cal.2d at page 599, 212 P.2d 894.

[13] As was said in Ayres v. City Council of Los Angeles, 34 Cal.2d 31, 37, 207 P.2d 1, 5, 11 A.L.R.2d 503: "The status of an autonomous city, Const. Art. XI, sec. 6; West Coast Advertising Co. v. San Francisco, 14 Cal.2d 516, 95 P.2d 138; City of Oakland v. Williams, 15 Cal.2d 542, 103 P.2d 168, is recognized by express references to city ordinances in the Subdivision Map Act. Where as here no specific restriction or limitation on the city's power is contained in the Charter, and none forbidding the particular conditions is included either in the Subdivision Map Act or the city ordinances, it is proper to conclude that conditions are lawful which are not inconsistent with the Map Act and the ordinances and are reasonably required by the subdivision type and use as related to the character of local and neighborhood planning and traffic conditions."

Finally, it is argued by plaintiff that the ordinance is unconstitutional because it deals with administrative or executive matters rather than "legislative", and that initiative and referendum could not be applied to executive and administrative matters.

[14–17] The Subdivision Map Act heretofore referred to, by its provisions, indicates the legislative intention that the action of cities in making requirements such as those questioned here would be "legislative" rather than "administrative or executive." In McKevitt v. City of Sacramento, 55 Cal.App. 117, 203 P. 132, the court, in considering the distinction between legislative and administrative or executive power, said, at page 124 of 55 Cal. App., at page 136 of 203 P.:

"Acts constituting a declaration of public purpose, and making provision for ways and means of its accomplishment, may be generally classified as calling for the exercise of legislative power. Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body, or such as are devolved upon it by the organic law of its existence."

It is apparent that the ordinance constitutes a declaration of public purpose and a provision for ways and means of its accomplishment within the quoted definition.

Judgment reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

103 Cal.App.2d 1

PEOPLE v. BARTON.

Cr. 4531.

District Court of Appeal, Second District,
Division 3, California.
March 20, 1951.

Sherwin L. Barton was convicted in the court, William M. Byrne, J., for lewd and lascivious acts upon a child under the age of 14 years, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that the evidence was sufficient to sustain the conviction.

Order affirmed.

1. **Criminal law** ⚷568

Where the question of criminal intent is involved, the circumstantial evidence is usually decisive of the issue.

2. **Criminal law** ⚷559

Criminal intent must usually be ascertained through inference, and an accused who may not have had a criminal intent in commission of an act becomes a criminal through judicial fiat if the trier of fact rejects the inferences which favor innocence and adopts those which point to guilt.

3. **Infants** ⚷20

Evidence sustained conviction for lewd and lascivious conduct with a child under the age of 14 years. Pen. Code, § 288.

Harry J. Gross and Harold W. Svenson, Jr., Van Nuys, for appellant.

Edmund G. Brown, Atty. Gen. and Dan Kaufmann, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was charged in three counts with violations of section 288 of the Penal Code. Trial by jury was waived. He was found guilty on each count. His motion for a new trial was denied, and thereupon proceedings were suspended as to each count and he was granted probation. No judgment was entered. He appeals from the order denying his motion for a new trial. His notice of appeal also states that he appeals from "the final judgment."

Appellant contends that the court abused its discretion by permitting the complaining witness, a girl seven years of age, to testify. Section 1880 of the Code of Civil Procedure provides: "The following persons cannot be witnesses:

"1. * * *

"2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

3. * * *."

Before the complaining witness was sworn as a witness, the trial judge asked her approximately twenty-seven questions as a basis for determining whether she was capable of being a witness. Her answers were responsive and indicated that she understood the questions. There was no voir dire examination by defendant's counsel, and no objection was made at the trial to the effect that she was not capable of being a witness. The cross-examination of the witness by defendant's counsel covers five pages of the reporter's transcript. The judge asked the witness many questions during the trial. The contention that the judge abused his discretion by permitting the girl to testify is wholly without merit.

Appellant also contends that "the judgment" is unsupported by the evidence. In her testimony the girl related facts which were legally sufficient to prove that defendant on three occasions violated said section 288. Defendant testified that on one occasion he placed his hand on her body while applying vaseline to relieve a soreness. He denied that he touched her on other occasions. No useful purpose would be served by reciting the testimony in detail. Factual issues were presented for the determination of the trial court. The evidence was sufficient to support the findings.

Since there was no judgment from which an appeal could be taken, the purported appeal from final judgment should be dismissed.

The order denying the motion for a new trial is affirmed. The purported appeal from the judgment is dismissed.

SHINN, Presiding Justice.

[1] I concur in affirmance of the order with considerable reluctance. Intent to arouse the passions, etc., is an element of the offense. The evidence of criminal intent was extremely weak. Defendant, in a bedroom of his home, rubbed vaseline on the privates of a seven year old girl who lived in the neighborhood. The child testified it happened three times, defendant that it happened only once. He and his wife have two small girls to whom they frequently apply vaseline in this manner to relieve chafing and soreness. The child often played around the house with defendant's children. Defendant testified that one of his daughters told him the child was sore, but his testimony was not corroborated. The child testified she was not sore. She also testified, in answer to leading questions, that defendant told her not to tell what he had done, which he denied. This was the only testimony that indicated defendant's consciousness of wrong or a criminal intent in the commission of the act. It would have been potent evidence if defendant had denied that he had applied vaseline to the child. His mere denial would have been evidence of a consciousness of guilt. But when questioned by the arresting officers he freely admitted what he had done and he testified in the same manner. His conduct and admissions negatived the inference that in meddling with the neighbor's child he had a criminal intent. He had the rather stupid idea that there was nothing wrong in ministering to the child as he and his wife ministered to their own small daughters. That his conduct was wrong, according to familiar standards, must be conceded, but it does not follow that it was venal. Where the question of intent is involved the circumstantial evidence is usually decisive of the issue, and I believe the testimony of the child that defendant told her to keep his conduct a secret, which as I say was elicited by leading questions, had negligible weight as proof of intent, as opposed to the frank admission and explanations of the defendant.

A fact which is significant because it is unusual in cases of this sort is that defendant is only 31 years of age. He had not been in trouble before and bore a good reputation. He and the child's father, now deceased, were friends and pilots in the late war. His wife testified in his behalf as to the manner in which they used vaseline upon their own daughters, and the reason for it.

[2] One reason for writing this concurrence is to call attention to the fact that defendant's conviction means that he might also have been convicted if he had been charged with the offense upon his own daughters. Intent must usually be ascertained through inference. An accused who may not have had a criminal intent in the commission of an act becomes a criminal through judicial fiat if the trier of fact rejects the inferences which favor innocence and adopts those which point to guilt. The present conviction carries far reaching implications. If the defendant has the evil mind and vicious character his conviction implies, I do not see how he could have been completely pure of heart when attending to his own daughters. Anyone who wished to question his motives could point to the fact that small girls are sometimes mistreated by their fathers. Upon the other hand, if he had attended to the needs of his daughters with the motives a father would naturally have, it seems strange that he would suddenly have developed criminal instincts where the neighbor's child was concerned. Perhaps the learned trial judge was thinking of "The Strange Case of Dr. Jeckyl and Mr. Hyde" and believed the young defendant was possessed of a dual personality. This would have been a highly speculative basis for a finding of criminal intent. Or he may have been of the opinion that defendant probably develops evil propensities whenever he is around small girls. In either case a father's treatment of his small daughters in the manner described could be attributed to evil motives if a court or jury should

believe that the child was not in need of attention.

[3] But after giving these problems a great deal of thought I have come to the conclusion that the evidence was not legally insufficient to support a finding of guilt. It is, in my opinion, a borderline case. So far as precedent is concerned, our affirmance of the order should certainly not be used as justification for a determination of guilt upon less substantial evidence than that contained in the present record.

VALLÉE, J., concurs.

ROSE v. MELODY LANE OF WILSHIRE et al.

Civ. 17727.

District Court of Appeal, Second District, Division 3, California.

March 21, 1951.

Rehearing Denied April 18, 1951.

Hearing Granted May 17, 1951.*

Jacob B. Rose brought an action for damages against Melody Lane of Wilshire, and others, to recover for injuries sustained in a fall when a stool in a cocktail bar broke. The Superior Court, Albert F. Ross, J., entered a judgment on a verdict for plaintiff and against defendant Pig'n Whistle Corporation and thereafter granted plaintiff's motion for new trial upon the issue of damages only, and defendant Pig'n Whistle Corporation appealed. The District Court of Appeal, Wood, J., held that where damage award is so slight as to indicate a compromise between jurors who favored a substantial award and those who did not believe that liability was established, new trial should be granted upon all the issues.

Order modified and purported appeal from the judgment dismissed.

1. New trial 🔑9, 52

Where plaintiff's medical bill alone was about $300 and defendant had adduced substantial evidence on issue of liability, verdict for plaintiff for $1 as general damages indicated a compromise so that grant of new trial for inadequacy of damages should leave open question of liability as well as that of damages. Code Civ.Proc. § 657.

2. Trial 🔑315

Where jurors who believe there is no liability on part of defendant surrender those views in consideration of other jurors consenting to an award in a trifling amount, verdict is not justifiable and in reality leaves question of liability undetermined. Code Civ.Proc. § 657.

3. New trial 🔑9

A limited new trial should not be granted where substantial justice requires that a new trial, if granted at all, should cover all issues. Code Civ.Proc. § 657.

4. New trial 🔑163(2)

Upon making order granting a new trial as to issue of damages only, there was no judgment. Code Civ.Proc. § 657.

5. Appeal and error 🔑123

Where order was made granting a new trial on issue of damages alone after entry of a judgment on a verdict for plaintiff in a nominal amount, defendant's purported appeal from the judgment would be dismissed for want of a judgment.

◆

Sidney A. Moss and Henry F. Walker, Los Angeles, for appellant.

David Schwartz, Beverly Hills, for respondent.

PARKER WOOD, Justice.

In this action for damages for personal injuries the verdict was for plaintiff against defendant Pig'n Whistle Corporation in the sum of $1 general damages and $250 special damages. Judgment was entered in accordance with the verdict. Plaintiff made a motion for a new trial upon the issue of damages only, which motion was based upon all the grounds for a new trial stated in section 657 of the Code of Civil Procedure, except excessive damages. In ruling upon the motion for a new trial, the court made the following order:

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* Subsequent opinion 240 P.2d 307.

"[T]he motion for a new trial is granted on the ground of inadequacy of the damages, and a new trial is ordered on the issue of damages only." Defendant's notice of appeal recites that he appeals from the judgment and from the order granting the motion for a new trial upon the issue of damages only.

Appellant contends that the evidence was insufficient to support the judgment; and that it was an abuse of discretion for the trial court to grant a new trial limited to the issue of damages.

On January 7, 1948, about 11 p. m., plaintiff and one Martell entered the cocktail bar of the Melody Lane restaurant to get "a drink." They went to the bar and sat on stools which were about 3½ feet high. About two seconds thereafter and while Martell was ordering the drinks, the top or seat portion of the stool upon which plaintiff was sitting "broke off" and plaintiff fell backward upon the floor. Thereafter plaintiff and Martell went to Martell's home, where plaintiff's wife was visiting, and from there plaintiff and his wife went home. Plaintiff testified that he was awakened that night by pain; the next day he observed black and blue marks on his leg, and he suffered pain at the bottom of his backbone; also on the day after the accident he went to see a doctor; up to the time of trial he still had pain and he could not sit comfortably on hard chairs, and he had not been dismissed by his doctor; his doctor had told him that his charges for medical services would be around $300. Plaintiff paid $52.50 to other doctors for X-rays.

The doctor, who rendered medical services for plaintiff, testified that he examined plaintiff on January 8th (day after accident); plaintiff suffered injury to the lower part of his back and legs; he had a hematoma on the left calf, which meant that he had quite a violent fall; he had a definite injury of the coccyx or the tailbone, which is a serious injury; the injuries are permanent; plaintiff is still his patient; he had seen plaintiff about 75 times; and the reasonable value of his services is around $300.

The seat portion of the stool is a kind of chair—with a backrest but without arms. The seat and backrest are upholstered in leather. The seat is about 16 inches square. On the underside of the seat there is a cast iron tripod or device which is fastened to the seat with bolts. In the tripod there is a round hole about ⅝ of an inch in diameter into which a steel pin that is approximately ⅝ of an inch in diameter and 4½ inches in length is inserted. The seat portion of the stool rests upon a pedestal which is about four inches in diameter and is fastened to the floor. The seat portion of the stool and the pedestal are connected by inserting the lower part of the steel pin into a cylinder at the top of the pedestal. The seat or chair of the stool can be turned on a swivel to the right or left.

One Perez, called as a witness by defendant, testified that he is employed by defendant as a maintenance mechanic and he has been so employed since 1927; he did not see the accident; and the morning after the accident he found the stool that had been broken and he removed the broken steel pin therefrom. That pin was received in evidence as defendant's "Exhibit F." He testified further that the seat involved here had been in the barroom since 1940 and it was in use there at the time of the trial; to repair the stool all he had to do was to remove the pin and insert another pin; it is necessary to grease the chair about every 30 or 60 days; the chair part lifts up, and when he cleans or greases the swivel he raises the seat and then puts it back again; that he greased it about two weeks before the accident occurred, and at that time he saw the pin which is involved here and there was nothing wrong with it; and during the time he was employed by defendant no other stools were broken.

The assistant manager of the Melody Lane testified that it was a part of his duties to inspect the stools; they are checked about every day; he checked them probably two or three days before the accident and there was nothing wrong with them; and in making the inspection, he turned them and checked the bases.

A chemical engineer, called as a witness by defendant, testified that he had been a chemical engineer since 1910; from 1910 to the time of trial, he had examined steel and other metal products to ascertain causes of breaks; at the request of defendant's counsel he made an examination of the broken pin which is defendant's exhibit F; he is familiar with that type of pin and it is a standard type of pin; he drilled holes in the pin in order to get a sample of steel for analysis; he made a chemical analysis to determine the type of steel; he made a microscopic examination to determine the appearance of the grain structure of the steel and to determine the type of failure; from his examination of the steel he determined that the break is known as a progressive fatigue fracture; such a fracture occurs where stresses are localized—the molecules of the steel start to separate at some point and as reverse stresses are applied from time to time the broken area increases to the point that it ultimately fails due to lack of metal; in his opinion this particular fatigue would have been very difficult to detect; he could not detect the fatigue without a microscope and he did not think that he could have detected it with a microscope; another pin, defendant's exhibit G (which is not broken), is visually the same type of pin as the broken pin (exhibit F); in his opinion exhibit F, before it was broken, would not have looked any different from exhibit G; any metal is likely to start fatigue; when there is progressive fatigue it is a potential cause of failure; when the failure would occur would depend upon the number of times the stress was applied to that particular section—it might be years or it might be a few days.

Plaintiff and Martell testified that there was subdued lighting in the barroom and it was dark therein.

After the jury had deliberated about 1½ hours, it returned to the courtroom and asked that the testimony of witness Perez be read. Pursuant to that request said testimony was read. (It is to be noted that his testimony did not relate to the issue of damages.)

Appellant (defendant) contends that it was an abuse of discretion to grant a new trial limited to the issue of damages. It argues to the effect that since the evidence in favor of plaintiff, if any, on the issue of liability was weak, and since the jury had difficulty in reaching an agreement as to liability, and since the total amount of the verdict was less than the amount of special damages, it is apparent that, in order to arrive at a verdict, members of the jury made unwarranted concessions or a compromise regarding the issue of liability; and that under such circumstances if a new trial should be had it should be upon both issues, liability and damages.

[1–3] There was evidence that the doctor saw plaintiff about 75 times regarding the injuries, and that his charge was about $300. The award of $1 as general damages, in view of the extent of the medical treatments, is not commensurate with the injuries sustained and is so inadequate that, when said award is considered in connection with the substantial evidence in favor of defendant on the issue of liability, it indicates that the verdict was the result of a compromise. Where, in order to arrive at a verdict, jurors who believe there is no liability on the part of defendant surrender those views in consideration of other jurors consenting to an award in a trifling amount, the verdict is not a justifiable one and in reality leaves the question of liability undetermined. Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 11, 175 P. 26, 177 P. 845; Wallace v. Miller, 26 Cal.App.2d 55, 59–60, 78 P.2d 745; Keogh v. Maulding, 52 Cal.App.2d 17, 20–21, 125 P.2d 858. "[I]t would work a grave injustice upon defendant to force it to a new trial of the issue as to damages only, with the issue as to liability, upon which no verdict other than in name had been rendered, forever closed against any inquiry." Donnatin v. Union Hardware & Metal Co., supra, 38 Cal.App. at page 11, 175 P. at page 27. "[I]t is an abuse of discretion to limit a new trial to the issue of damages when the amount awarded by the jury is so small in view of the damages proved that it must be concluded that the verdict is the result of some of the jurors sacrificing their conscientiously held view that the defendant was not liable and agreeing to a small but inadequate award for the plaintiff in order to arrive at some verdict." McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 15, 146 P.2d 34, 36. "A limited new trial should not be granted, where substantial justice requires that a new trial, if granted at all, should cover all the issues." Bencich v. Market St. Ry. Co., 20 Cal.App.2d 518, 528–29, 67 P.2d 398, 403. In the case of Wilke v. Crofton, 34 Cal.2d 304, at page 310, 209 P.2d 790, at page 793, the court said: "In many instances a retrial of the single issue of damages would meet the requirements of substantial justice [Citations], but where, as here, the evidence as to liability is sharply conflicting and the damages awarded are so grossly inadequate as to indicate a compromise of the issues of liability and damages, the entire case should be re-examined."

The trial court herein properly concluded that the amount awarded as damages was inadequate to compensate for the injuries sustained, but it erred in limiting a new trial to that issue. The court should have ordered a new trial as to all the issues. In Keogh v. Maulding, supra, 52 Cal.App.2d 17, 125 P.2d 858, the court modified an order, which limited a new trial to the issue of damages, by ordering a new trial as to all the issues.

[4, 5] As above stated, defendant also gave notice that it appeals "from the judgment." After the order was made granting a new trial as to the issue of damages only, there was no judgment. Statements in the case of Universal Film Mfg. Co. v. Kerrigan, 47 Cal.App. 255, 190 P. 475, are applicable here. In that case it was said 47 Cal.App. at page 256, 190 P. at page 475: "Although the appeal has been presented by briefs arguing the case on its merits, the court is forced to take notice of the fact that there is no judgment, and therefore, there can be no appeal therefrom. The order for retrial of the issue as to amount of damages, necessarily set aside the judgment. This is an action at law, wherein the judgment is single and indivisible, for it consists of only the one order that the plaintiff recover from the defendant so much money. Taking out that recovery, nothing effective as a judgment remains in existence." The purported appeal from "the judgment" should be dismissed.

In making the decisions herein, regarding a new trial and a purported appeal from a judgment, this court has not decided the merits of the question as to liability.

The order granting a new trial as to the issue of damages only is modified by ordering a new trial upon all the issues. The purported appeal from "the judgment" is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

102 Cal.App.2d 785

In re DOUGHERTY'S ESTATE.

BRIDGES v. DOUGHERTY.

Civ. 14559.

District Court of Appeal, First District,
Division 2, California.
March 13, 1951.

Rehearing Denied April 12, 1951.
Hearing Denied May 10, 1951.

Proceedings in the matter of the estate of E. L. Dougherty, deceased, wherein Robert L. Bridges, as executor, and Ruth Ida George, filed motions opposed by Cecile M. Dougherty, to terminate a family allowance and to modify an allowance previously made. The Superior Court in and for the City and County of San Francisco, T. I. Fitzpatrick, J., entered an order denying the motions, and the executor and Ruth Ida George appealed. The District Court of Appeal, Nourse, P. J., held that the motions to terminate the allowance should have been granted effective of the date they were filed.

Order reversed.

1. Executors and administrators ⚷173

Where will was admitted to probate, court had power to grant widow such reasonable allowance as necessary, and determination of reasonableness and necessity was matter in discretion of trial court. Probate Code, § 680.

2. Executors and administrators ⚷194(4)

Where only reason given for failure of court to act promptly on petitioner's motion to modify family allowance was that widow's contest of will was pending, and that after widow lost contest she might move for new trial, neither was a factor in determining what was reasonable allowance as should be necessary for maintenance of widow and minor children and which was authorized by statute. Probate Code, § 680.

3. Executors and administrators ⚷194(1)

In a proceeding wherein a petition has been filed to modify family allowance on ground that it is excessive, court should consider needs of widow and also determine what is a reasonable time within which estate should be settled and to fix amount of allowance accordingly. Probate Code, § 680.

4. Executors and administrators ⚷197

When it is made to appear that settlement of estate is delayed by act of widow for sole purpose of continuing family allowance, and that by reason of such allowance estate has become insolvent and unable to pay legacies under will, it is breach of discretion to deny an application to terminate allowance after reasonable time within which estate should be settled. Probate Code, § 680.

5. Executors and administrators ⚷197

Where motions to terminate family allowance were heard on September 29, and estate was then ready to be closed and was unable to pay legacies in full, and as of September 29 widow had been paid allowance for 16 months after will was admitted to probate, the motions should have been granted effective of date they were filed. Probate Code, § 680.

◆

Thelen, Marrin, Johnson & Bridges, San Francisco, for appellant Robert L. Bridges, as executor.

Bruce Walkup, Dan L. Garrett, Jr., San Francisco, for appellant Ruth Ida George.

Elmer P. Delany, Martin J. Jarvis, San Francisco, for respondent.

NOURSE, Presiding Justice.

Two appeals are taken on the same record from an order denying motions to terminate a family allowance and modifying an allowance theretofore made.

E. L. Dougherty died testate on May 30, 1948. On July 22, 1948, his will was admitted to probate. On November 1, 1948, the court granted the widow a family allowance of $750 a month from the date of the death of the testator. On December 21, 1948, the widow filed a contest of the will. On February 28, 1949, the executor filed his first account showing that all debts had been paid and that the estate was then ready to be closed except for the pending contest. It then appeared that the estate had been diminished from the inventory value of $41,535 to $29,508 by payment of the family allowance and expenses of administration.

On April 25, 1949, appellant George filed a petition to modify the family allowance on the ground that it was excessive since the widow had theretofore received from deceased $33,712 in life insurance, a home valued at $25,000 which has been held in joint tenancy, and all the household furnishings.

On May 10, 1949, the petition was set for hearing, but the court refused to hear it pending the will contest. Other continuances were granted because of the pendency of a motion for a new trial of the contest. In the meantime the executor filed his petition for a modification of the family allowance showing that the widow had been paid $10,500 in family allowance and that the original estate of $41,535 had been depleted to $25,024 and that attorney's fees and expenses of defending the contest remained to be paid.

On October 25, 1949, more than six months after the petition was filed, the court made its order reducing the allowance to $350 a month commencing October 1, 1949. The appellants argue that the order discloses a double breach of discretion, first in continuing the allowance to the widow in any amount, and second in awarding her the full $750 for the six months period pending the hearing of the motion which delay was due solely to the fault of the court.

[1] On the first point the parties agree that, under section 680 of the Probate Code, the court had power to grant the widow such reasonable allowance as may be necessary and that the determination of the reasonableness and the necessity is a matter in the discretion of the trial court. But there is no fixed rule defining judicial discretion in a matter of this kind. If the trial court had had before it the facts which are before us we have no doubt but it would have granted the motion. When this appeal was argued we also heard argument on a motion to dismiss the appeal from the judgment in the will contest. On January 3, 1951, that appeal was dismissed by this court on the showing that though notice of appeal was given on July 26, 1949, no record on appeal had been filed. In re Estate of Dougherty, 101 Cal.App.2d 576, 225 P.2d 613. There was thus an inexcused delay of nearly fifteen months during which time the widow would continue to receive the family allowance under the order here on appeal. But these are facts which were not before the trial court when the order was made and the trial court cannot now be charged with a breach of discretion in not anticipating the unreasonable delays of the widow in perfecting her appeal.

[2] But this does not dispose of the matter. When appellant George's motion first came on for hearing the court stated that the $750 was too high and should be reduced. Through no fault of appellants their motions were not heard for five months. Then the court ordered a reduction from that date to $350. There were no changed circumstances during this five months period. All the grounds for a reduction of the award were just as strong in May, 1949, as in October. And if the $350 was a "reasonable" amount in October, $750 was an unreasonable amount to be paid from May to October. The only reason given for the failure to act promptly on appellant George's motion was first, that a contest of the will was pending, and second, that after the widow lost the contest she might move for a new trial. Neither of these is a factor in determining what is "such reasonable allowance * * * as shall be necessary for their [the widow and minor children] maintenance." Section 680, Probate Code.

[3] The rule is settled that in a proceeding of this kind the court should consider the needs of the widow and also "determine what is a reasonable time within which the estate should be settled and to fix the amount of the allowance accordingly." In re Estate of Coffin, 16 Cal.App.2d 532, 534, 61 P.2d 81, 82; In re Estate of Clark, 96 Cal.App. 243, 246, 274 P. 76; In re Estate of Broad, 134 Cal.App. 196, 199, 25 P.2d 31. The record discloses that neither factor was considered. It is conceded that the widow was in no need of the allowance for her support—that her personal fortune was far in excess of the value of the entire estate. And manifestly the court could not have anticipated the dilatory tactics of the appellant in the will contest, but it could have determined the reasonable time for closing the estate since it was shown that the estate was at that time ready to be closed, except for the pendency of the contest.

[4, 5] We hold that when it is made to appear that the settlement of the estate is delayed by the act of the widow for the sole purpose of continuing the allowance, and that, by reason of such allowance the estate has become insolvent and unable to pay the legacies under the will, it is a breach of discretion to deny an application to terminate the allowance after "a reasonable time within which the estate should be settled." It was shown at the time these motions were heard on September 29, 1949, that the estate was then ready to be closed and that it would be unable to pay the legacies in full. As of that date the respondent had been paid the allowance since May 30, 1948, a period of sixteen months. The motions to terminate the allowance should have been granted effective of the date they were filed.

Order reversed.

DOOLING, J., and SCHOTTKY, Justice pro tem., concur.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

In re SALMONSKI'S ESTATE.

SALMONSKI et al. v. BARDZINSKI et al.
Civ. 7810.
Sac. 6033.

District Court of Appeal, Third District, California.
March 16, 1951.
Hearing Granted May 14, 1951.*

Proceedings in the matter of the estate of Wladyslaw Salmonski, also known as Walter Salmonski, deceased, wherein Josephine Salmonski and another, brought a proceeding against Theresa Bardzinski and another, to determine interest to distribution under decedent's will. The Superior Court, Sacramento County, Malcolm C. Glenn, J., adjudged defendants to be entitled to distribution of the estate of decedent, one-half to each, and that plaintiffs, had no interest therein, and the plaintiffs appealed. The District Court of Appeal, Van Dyke, J., held that the provisions of the codicil, leaving the estate to defendants, constituted clear and distinct devises last in point of time and place in the will and could not be affected by inference or argument from other parts of will.

Judgment affirmed.

Peek, J., dissented.

1. Wills 🔑309

When one or more instruments are presented for probate and claimed to constitute a will, only question legitimately before court is whether such instrument or instruments constitute a will, and in determining that question court ordinarily has nothing to do with construction of will.

2. Wills 🔑423

What documents, and what parts of documents go to make up will, must necessarily be decided in first instance in an initial probate proceeding and determination so made has effect of judgment and becomes conclusive in course of time.

3. Wills 🔑439

Cardinal rule of interpretation of wills is to find the intent of testator.

4. Wills 🔑450

As an aid in arriving at intent of testator for purposes of construction of will, an effort must be made to give expression to all words of will.

5. Wills 🔑470

In construing wills, where meaning of any part of will is doubtful, reference should be made to other parts thereof in an effort to clear up doubt.

6. Wills 🔑470

All parts of a will are to be construed in relation to each other so as, if possible, to form one consistent whole.

7. Wills 🔑472

Where several parts of a will are absolutely irreconcilable, latter must prevail.

8. Wills 🔑471

A clear and distinct devise or bequest cannot be affected by inference or arguments from other parts of instrument. Probate Code §§ 103, 104.

9. Wills 🔑184(3)

Where testator made formal will indicating conditional bequests to sister and brother, and five days later wrote letter declared to be a codicil addressed to named executrix requesting that she sell stocks and divide everything between herself and named beneficiary and declaring that such was his last wish, testator destroyed dispositive provisions of formal will.

10. Wills 🔑184(3)

Where testator executed will making conditional bequests to sister and brother and five days later wrote letter to named executrix that in case of his death she was to sell stocks and divide everything between herself and named beneficiary and that such was his last wish, by directing sale of stock, it would be presumed that testator knew executrix could not carry such direction out except as executrix, and testator had his formal will in mind and therefore such dispositive provisions in letter being later in time and place to those in formal will would prevail.

11. Wills 🔑189

Where testator executed formal will in which he expressed doubt whether sister and brother were alive but made bequests to them conditioned upon their proof of survivorship within one year from testator's death and five days later wrote a letter to named executrix that in case of his death she was to sell stocks and divide everything that belonged to him between herself and named beneficiary and that such was his last wish, in absence of showing that at some time during such five days testator mistakenly concluded that brother and sister were dead and for that reason wrote letter, doctrine of dependent relative revocation was inapplicable.

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* Subsequent opinion 238 P.2d 966.

12. Executors and administrators ⚿314(12)

In a proceeding by persons claiming to be entitled to distribution, where there was no offer or attempt to tell trial court of what evidence relating to circumstances attending execution of two testamentary documents might consist, appellate court could not, declare error for refusal of trial court to hear such evidence. Probate Code, § 1080.

13. Wills ⚿440, 441

When an uncertainty arises upon face of will as to meaning of any of its provisions, testator's intention is to be ascertained from words of will and circumstances of execution thereof may be taken into consideration, excluding oral declarations of testator, but where intent is plain, court's duty is to declare that intent without regard to consequences. Probate Code, § 105.

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Thomas W. Loris, Sacramento, for appellants.

Busick & Busick, Sacramento, Charles M. Frey, San Francisco, for respondents.

VAN DYKE, Justice.

This is a proceeding brought under Section 1080 of the Probate Code by persons claiming to be entitled to distribution of the Estate of Wladyslaw Salmonski, Deceased. On June 12, 1946, said decedent executed a will. Therein he declared that he gave to his sister, Jozefa Salmonski, and to his brother, Waclaw Salmonski, appellants here, each forty-five per cent of his estate. He attached a condition to each of these bequests which was that unless the beneficiaries proved survivorship within one year from decedent's death the bequest to the one so failing in such proof should lapse. He stated the condition was imposed because he had not heard from either "since World War II ended", although he had written to his sister's last known address in that part of Poland overrun by invading armies. He expressed doubt that either was alive. He then gave to Theresa Bardzinski, one of respondents herein, ten per cent of his estate. He provided that if either or both legacies to the brother and sister should lapse then respondent Leocadia Butkin should receive $1,000 and Theresa Bardzinski all of the residue of his estate. He named Theresa Bardzinski as his executrix and gave her power of sale as such without necessity of notice or order, but subject to confirmation of court. Five days later decedent wrote a letter reading at follows:

"Sacramento, Calif.
June 17, 1946.

"Dear Mrs. Bardzinski.

"In case of my death kindly sell the stocks and devide everything that belongs to me between yourself and Mrs. Leocadia Butkin.

"This is my last wish

"Your friend
Walter Wladyslaw Salmonski"

Salmonski died on July 6th following and on July 11th Mrs. Bardzinski petitioned the Sacramento County Superior Court that both documents be admitted to probate together as the last will and testament of decedent and for her appointment as executrix thereof. She alleged the letter was a codicil to the formal will. On July 26th Mrs. Butkin filed a contest in which she asked that the first instrument in point of time, the formal will, be denied probate and that the letter be admitted as the olographic will of decedent. At the same time she filed petition to have herself appointed as administratrix with the will annexed of the alleged olographic will. By her pleadings she contended that the letter was a later will which revoked the prior will. All three matters were heard together and the court made the following dispositions thereof: It dismissed the contest, it denied the petition of Mrs. Butkin for letters of administration with the will annexed upon the alleged olographic will alone, and it admitted both documents to probate together as the last will and testament of decedent, appointing Mrs. Bardzinski executrix thereof. The letter was admitted to probate as a codicil of the prior will. No appeal was taken from any of these orders, and all in course of time have become final.

Thereafter the brother and sister of decedent, appellants here, appeared in the proceeding and made the necessary proof of survivorship. On April 12, 1949, they began this proceeding, asking that it be adjudged each was entitled to forty-five per cent of the distributable estate of deceased. Mrs. Bardzinski and Mrs. Butkin, respondents to the petition to determine interests in the estate, answered the same, alleging that the whole of the estate should be distributed one-half to each. At the time set for hearing appellants' petition to determine interest, the respondents moved the court for an order submitting the matter on the pleadings and all other papers on file in the estate proceeding upon the ground that no other evidence, oral or documentary, was admissible. This motion was granted over the objection of appellants. Thereafter the court adjudged respondents to be entitled to distribution of the estate of decedent, one-half to each, and that appellants, the brother and sister, had no interest therein.

It appears from the inventory that decedent's estate, with the exception of a watch and a ring of little value, consisted of money and stocks, appraised at a total value of $22,684.48.

When the petition of Mrs. Bardzinski praying for admission of both testamentary documents as the last will of decedent and a codicil thereto came on for hearing, along with the petition of Mrs. Butkin that probate be refused to the first testamentary document and granted as to the last, the court, after reciting that findings of fact and conclusions of law in writing had been waived by the parties, ordered and adjudged as follows: "That the said Document heretofore filed, purporting to be the Last Will, with a Codicil thereto, of the said Deceased, be and it is hereby admitted to probate as such."

From what has been said it appears that the court adopted the theory of Mrs. Bardzinski that the two documents proposed for probate by her constituted a will and a codicil. And it is equally clear that the court then refused to adopt the theory of Mrs. Butkin that the letter was in fact the last will of decedent and worked a revocation of the previously executed will.

When the present proceeding now on appeal was decided the court made findings as follows: That decedent left a will dated June 12, 1946, "and an Holographic Will, wholly dated, written and signed in the handwriting of said Decedent, dated June 17–1946"; that after a contest of the will between said Leocadia Butkin, as contestant, and said Theresa Bardzinski, as contestee, both documents were admitted to probate, one as the will and the other as a codicil thereto; that Theresa Bardzinski was appointed executrix of the said will and codicil; that said codicil is in words and figures, as follows: [Quoting letter of June 17 referred to as a codicil]; that said codicil in letter form was addressed to Mrs. Bardzinski "who was named in said Will dated June 12, 1946, as Executrix thereof"; that there was no uncertainty in either the will or the codicil; that the codicil was a later testamentary disposition adequate by its terms to dispose of and that it did dispose of the entire estate of the decedent; that distribution of the estate should therefore be made pursuant to the terms and provisions of the codicil; that the codicil devises one-half of the property in the estate to Mrs. Bardzinski and one-half to Mrs. Butkin; that neither the brother nor the sister had any interest in the estate or any part thereof and neither was entitled to distribution of anything to him or her. The court concluded that distribution should be so ordered and by the judgment following it was ordered that when distribution was to be made it would be made in accordance with the findings.

The theories upon which the appellants proceeded in the trial court and which theories they again present to this court on appeal may be briefly stated as follows: First, they say that the order admitting the will and codicil to probate was absolute and unqualified with the result that both testamentary documents were adjudicated to constitute the entire will of decedent and that, therefore, in construing the will both documents must be considered. Any claim, they say, that the letter which the court found to be a codicil in fact revoked the prior instrument was disallowed in the order of admission to probate; and that order, not having been appealed from, became final and conclusive. Next, and based upon the foregoing, appellants contend that the conditions impressed upon the bequests made to respondents in the will are also impressed upon the bequests made to them in the codicil and appellants say this is true despite the fact there is no reference to those conditions in the codicil; that the dispositions in the codicil are additional or substituted gifts or bequests and therefore are impressed with the same condition, quality or incident impressed upon the dispositions in the will. From this they conclude that the interest of respondents in the estate of the decedent under the codicil would vest only in the event that the brother and sister failed to produce proof of their existence within a year from the date of the testator's death. Again, based upon the same premise that the codicil did not revoke the prior will, appellants seek to apply the rule of dependent relative revocation in that it must be considered that when the codicil was executed the testator did so under the mistaken belief that the brother and sister were not alive. Generally, they contend that when the entire will is construed that is to be found a clear intent on the part of decedent to modify and change the bequests to his brother and sister only in the event that they failed to appear within the year. Finally, appellants say that since the trial court refused to hear any testimony as to the facts and circumstances attending the execution of the codicil, the court erred in finding the codicil was an olographic will revocatory of the prior will for want of such evidence; and that it was error for the trial court to refuse to allow appellants the right to present evidence. In that respect they argue that when the will and codicil are considered as one entire document ambiguity and uncertainty appear.

[1, 2] Returning to the contention of appellants that by the order of admission to probate and the lack of any appeal therefrom it was conclusively adjudicated that the letter constituted a codicil to the formal will and did not revoke the same, it must be said that when the issues tendered to the trial court by the petitions for probate and the contest to the admission to probate of the formal will, as an unrevoked will of decedent, are considered there is much merit in appellants' position. It is true that when there is presented for probate one or more instruments claimed to constitute a will the only question legitimately before the court is whether or not such instrument or instruments constitute a will; it is equally true that in determining that question the court ordinarily has nothing to do with the construction of the will. In re Estate of Murphy, 104 Cal. 554, 38 P. 543; In re Estate of Cook, 173 Cal. 465, 468, 160 P. 553; In re Estate of Dunn, 32 Cal.App.2d 240, 243, 89 P.2d 667. Nevertheless it is also true that what documents, and what parts of documents go to make up a will must necessarily be decided in the first instance in the initial probate proceeding; and determinations so made have the effect of judgments and become conclusive in course of time. For example, in the case of In re Estate of Parsons, 196 Cal. 294, 237 P. 744, a document had been admitted to probate as the will of decedent. It contained dispositive paragraphs through which pencil lines and marks had been drawn. The order admitting the document to probate made no mention thereof. No appeal was taken nor contest filed within the year then allowed. On petition for partial distribution later it was found by the court that decedent had drawn these lines with intent to cancel the dispositive provisions contained in paragraphs through which the lines were drawn. The court held that the question of revocation must be pre-

sented and decided either when the will is offered for probate or by a proceeding or contest brought within the statutory time thereafter; that probate procedure contemplates a series of different proceedings, each of which is separate as to the matters embraced within its purview and that an adjudication as to each step in the series is intended to be final and not subject to review in a subsequent stage in the administration of the estate; that an order admitting a will to probate is appealable; that a proceeding for probate of a will is in rem instituted for the purpose of establishing the status of a written instrument; that an attack aimed at a will in response to a petition for distribution filed more than one year after the will was admitted to probate is collateral; that where questions of revocation are thus brought up the issue thus joined is one that could have been raised upon the proceeding for probate; that if not so done then the order admitting the document as a will is conclusive against any later attempt to invalidate part of the instrument upon claim of cancellation or revocation. See, also, In re Estate of Moeller, 199 Cal. 705, 251 P. 311.

[3-10] But we think that it is unnecessary to further discuss this contention of appellants for the reason that, assuming it to be sound, it leaves the two documents standing as the complete and entire will of the decedent and to be construed under applicable rules of construction. It is too clear for controversy that there is a conflict between the provisions of the letter or codicil and the provisions of the formal will. The formal will was clear in all its terms and disposed of the entire estate. Five days later decedent executed the document admitted to probate as a codicil to the formal will. Its terms are equally clear and unambiguous. It also disposes of the entire estate and in a manner contrary to and destructive of the dispositive provisions of the formal will. Appellants would have the whole will construed in such way that the plain dispositions of the codicil would be made conditional and not absolute. Appellants say the entire will should be construed as providing for the brother and sister if they appeared and proved their survivorship and that if they did not then and then only respondents would take the whole estate under the codicil. But we think such a construction is unwarranted. In saying this we are not unmindful of the rules of construction referred to in the briefs of appellants to the effect that the cardinal rule or interpretation of wills is to find the intent of the testator; that as an aid in arriving at that intent an effort must be made to give expression to all the words of a will; that where the meaning of any part of a will is doubtful reference should be made to other parts of the will in an effort to clear up the doubt; that all parts of a will are to be construed in relation to each other and so as if possible to form one consistent whole. The foregoing rules are declared in the Probate Code and in numberless decisions of our appellate courts. But the code and decisions equally declare that where several parts of a will are absolutely irreconcilable the latter must prevail and that a clear and distinct devise or bequest cannot be affected by inference or arguments from other parts of the instrument. Probate Code, secs. 103, 104. We think the last two rules must be applied here and that the effect thereof cannot be avoided or departed from without doing violence to the clear last testamentary expression of decedent. He had made a formal will indicating throughout consultation with and the guidance of counsel. Five days later he wrote the document declared to be a codicil and by it he utterly destroyed the dispositive provisions of the formal will. No other construction is possible. The letter which constituted the codicil was addressed to Mrs. Bardzinski, whom he had named his executrix in his prior will. He directed her to sell his stocks, a direction which of course he must be presumed to have known she could not carry out except as the executrix of his will and he thus must be deemed to have had his formal will in mind; and he further told her that after the sale of the stocks, thus making his whole estate consist of money only, with immaterial exceptions, she was

to divide everything that belonged to him between herself and Mrs. Butkin. Having in mind the dispositive provisions he had made in that will in favor of his brother and his sister, conditional though they were, he could not have said what he did in the codicil unless he had the clear intent to change his mind completely in respect to those dispositions and leave his entire estate to respondents here. These dispositive provisions appear last in the will and they are absolutely irreconcilable with the provisions favoring appellants, his brother and sister, and being later in time and place must prevail over them; the provisions of the codicil constitute clear and distinct devises last in point of time and place in the will and they cannot be affected by inference or argument from the other parts of the will.

[11] We do not think that the doctrine of dependent relative revocation is applicable here. It is the position of appellants that the doctrine is applicable since the revocation, if any, was conditioned upon the mistaken belief of decedent that his brother and sister were not living. They say this mistaken belief is found in the will itself where the decedent makes the assertion it is doubtful if they are alive. It is obvious that if the doctrine has any application it must be because at some time during the five days between the making of the formal will and the writing of the letter the decedent mistakenly concluded that his brother and sister were dead, and for that reason wrote the letter to Mrs. Bardzinski. This is a pure assumption finding no support anywhere in the testamentary documents. He did express his doubt of their survival in the formal will. If that doubt persisted and because of it he made the changes stated in the letter it was his right to do so and he would not be acting under mistake. His action would be founded upon an existing doubt. If he came to the mistaken belief that they were dead he neglected to state that fact either directly or by implication, and without such expression somewhere in the testamentary documents the court is without power to supply it.

[12, 13] What we have said disposes of all the contentions of appellants save perhaps only their contentions based upon their effort to have the trial court take evidence of the circumstances attending the execution of the two testamentary documents and the court's refusal to do so. In respect to these contentions it must first be said that, even assuming the court was presented with a situation where such testimony would be admissible, still we cannot from this record pass upon the matter because nowhere in the proceedings before the trial court, as disclosed by the record here, was there any offer or attempt to tell the trial court of what that evidence might consist. There was neither offer of proof nor statement that might be so construed. We could not therefore here in any case declare error for refusal to hear testimony. Dougherty v. Ellingson, 97 Cal.App. 87, 98, 275 P. 456; Hammond Lumber Co. v. Henry, 87 Cal.App. 231, 234, 261 P. 1027. But we think this point is immaterial because we do not think the situation presented to the trial court was one which would authorize the taking of testimony to aid the court in ascertaining the intent of the testator. When an uncertainty arises upon the face of a will as to the meaning of any of its provisions the testator's intention is to be ascertained from the words of the will, but the circumstances of the execution thereof may be taken into consideration, excluding the oral declarations of the testator. Probate Code, Sec. 105. But where the intent is plain the duty of the court is to declare that intent without regard to the consequences. In re Estate of Spreckels, 162 Cal. 559, 567, 123 P. 371. Such we hold to have been the situation here. The trial court was correct in refusing to resort to extrinsic evidence.

The judgment appealed from is affirmed.

ADAMS, P. J., concurs.

PECK, Justice.

I dissent: I cannot agree with the conclusion reached in the majority opinion.

It appears to me that in the absence of an appeal, the first order following the Butkin contest, which order admitted the two documents as a will and codicil, respectively, must be accepted as finally establishing the status of each document as such. In re Estate of Parsons, 196 Cal. 294, 237 P. 744; In re Estate of Dunn, 32 Cal.App.2d 240, 243, 89 P.2d 667.

At the outset the court was confronted with two documents either of which was sufficient in and of itself as the last will of the decedent. But the independent nature of the two instruments (particularly the second) should not be allowed to obscure the more fundamental fact to this controversy: that independently sufficient as each may be, both were admitted as one document containing two parts, one part thereof being the will and the other part thereof being the codicil thereto.

Thus, since that order has become final, both instruments must now be construed together as one document—the last will and testament of the deceased. Probate Code, sec. 101. Also the provisions of each part must be construed in relation to each so as to form "one consistent whole" and it is only if the latter document is "absolutely irreconcilable" with the former that it must prevail. Probate Code, sec. 103.

There can be no question but that in the formal will it was the very evident intent of the testator to first provide for his brother and sister, the natural objects of his bounty, and second, to provide for respondents subject to the conditions therein expressed. Such a situation well poses the reason for the rule that additional or substantial legacies given by a codicil are attended by the same incidences and conditions as were the legacies given originally by the will. In re Estate of Cross, 163 Cal. 778, 781, 127 P. 70; 1 Jarman on Wills, p. 149.

The formal will did not provide for equal participation by Bardzinski and Butkin. Paragraphs II and III gave, subject to the conditions previously mentioned, ninety per cent of the testator's estate to his brother and sister to be shared equally between them. By paragraph IV Bardzinski was given the remaining ten per cent of the testator's estate at the time of his death. Paragraph V gave Butkin $1,000.00 but only in the event that his brother and sister failed to establish his or her existence as provided. The last paragraph further provided that such failure of proof would cause the bequests to said legatees to lapse, and Bardzinski would then receive all of the residue.

The effect of applying to the present case the rule enunciated in the Re Estate of Cross, supra, simply means that under the codicil Bardzinski and Butkin would share equally in the remainder of the testator's estate after distribution to the brother and sister of his or her share. Surely such a construction is not so inconsistent with the formal portion of his will as to result in a complete revocation thereof, and surely it cannot be said that such a conclusion is more violent in its application to the facts and circumstances presented in the instant case than was the conclusion reached by the Supreme Court in Re Estate of Cross, supra, upon the facts and circumstances there presented.

Without question the first document makes a clear disposition of the entire estate. It is also true that the second document, standing alone, likewise makes a clear disposition thereof. It is only when the second is read in conjunction with the first that the second becomes ambiguious. Hence it necessarily follows that whatever inconsistency, ambiguity or doubt may exist, exists only because of the second document. This situation points up the reason for the further rule that a clear disposition by will should not be disturbed by a doubtful expression or an inconsistent disposition contained in a codicil. In re Estate of Dominici, 151 Cal. 181, 90 P. 448; In re Estate of Moorehouse, 64 Cal.App.2d 210, 148 P.2d 385.

Finally it must be noted that the construction approved in the majority opinion excludes the natural heirs of the testator in favor of strangers, and hence conflicts with the well established rule that where there is any doubt as to the intent of the testator the construction should be adopted which favors those of the blood of the testator to strangers. In re Estate of Norrish, 135 Cal.App. 166, 26 P.2d 530.

Therefore, in view of the rules heretofore mentioned, it is my conclusion that the order should be reversed (1) because of the finality and conclusiveness of the first order admitting the two documents t. probate as one instrument, the will and the codicil of the testator; (2) because of the rule which necessarily follows impressing upon the legacies given by the codicil all of the conditions and incidences of the legacies given by the will; (3) because of the evident intent of the testator to first provide for his brother and sister, the natural objects of his bounty, and (4) finally because of the rule relating to inconsistencies and ambiguities which are presented not because of anything in the formal will but only because of the codicil which, when viewed as an independent instrument and not as a part of the whole, presents the element of inconsistency.

102 Cal.App.2d 831

PEOPLE v. GREEN.

Cr. 4518.

District Court of Appeal, Second District, Division 3, California.

March 14, 1951.

Edward Daniel Green and one Howard Richard Hodge were jointly accused of the offenses of burglarizing a house and stealing a television set. From a judgment of the Superior Court of Los Angeles County, Thomas J. Cunningham, J., Edward Daniel Green appealed. The District Court of Appeal, Shinn, P. J., held that a conviction could not be allowed to stand where it rested chiefly upon the testimony of an accomplice, given under a promise of immunity upon the condition that the testimony the accomplice was about to give would be such as would result in the conviction of one jointly charged with the witness.

Reversed and remanded for new trial.

1. Criminal law 🔑42

Where ends of justice will thereby be served, immunity may be extended to one jointly charged with crime, upon condition that he testify fully and fairly as to his knowledge of facts out of which charge arose.

2. Criminal law 🔑539(1), 1169(1)

In prosecution for burglarizing house and stealing television set, where transcript of proceedings at preliminary hearing, admitted at trial as part of State's case, showed that witness' testimony, subsequently repudiated at defendant's trial, had been given at preliminary hearing under promise to witness of immunity upon condition that witness' testimony would be such as would result in conviction of defendant, a miscarriage of justice was occasioned and defendant's conviction, based in part upon witness' testimony at preliminary hearing, could not stand.

Edward Daniel Green, in pro. per.

Fred N. Howser, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant and one Howard Richard Hodge were jointly accused of the offenses of burglarizing a house and stealing a television set. Both were before the court at the preliminary hearing. Hodge at that time testified against Green. As will appear later, Green did not deny having been with Hodge, but did deny that he knew that Hodge was taking a set that did not belong to him. Hodge testified at the preliminary that Green did know that the set was to be stolen. Upon the trial he repudiated his testimony as to Green's guilty knowledge and testified that Green did not know that Hodge was stealing the set.

The transcript of the proceedings at the preliminary which was admitted at the trial as a part of the case of the People, discloses an astonishing bargain made by the prosecutor with Hodge for testimony unfavorable to Green. We quote from the record: "[Deputy District Attorney] Now, your Honor, at this time it is my understanding that the defendant Hodge is willing to take the stand and testify with reference to the facts covered by this complaint. In the event that Mr. Hodge does that, does take the stand and does testify, I am going to ask that the charge against him be dismissed.

"The Court: All right. [Deputy] I ask your Honor if he desires to take the stand, that you also warn him of his constitutional rights, his right against self-incrimination. Is it your desire to take the stand and testify in this case?

"Defendant Holdge: It is my desire, but you said the case would be dismissed. Which one is that? [Deputy] That is this case.

"Defendant Hodge: This one? [Deputy] The present case.

"Defendant Hodge: The present case? [Deputy] Yes.

"Defendant Hodge: No, I don't want to testify. (Recess taken.) [Deputy] Your Honor, the investigating officers have talked to Mr. Hodge during the recess and I understand that Mr. Hodge is now willing to take the stand.

"Defendant Hodge: Yes, sure."

The transcript shows clearly the bargain that was made in the courtroom during the recess, by means of which the unwilling Hodge was induced to admit his own part in the crimes, and to implicate Green. When he was called to the stand and was sworn, the court advised him that he need not testify, he was reminded that he had been bound over for trial upon a separate charge, and the following occurred between Hodge and the deputy district attorney: "A. [Hodge] I understood you to say that you would dismiss one count against me, or something like that. [Deputy District Attorney] That is the Bergo count. [The present case.] You are named as codefendant with Mr. Green in the Bergo transaction. A. Yes. [Deputy] That is the one I will dismiss if you testify in this case. A. Sure. [Deputy] Or I will move to dismiss. A. Sure. The Court: And the purpose of that, I assume, is to hold the defendant Green? [Deputy] Yes. Now, except for this conversation here in court between you and I in which I have stated that I am going to move to dismiss this count, the Bergo count against you, *if Mr. Green is held to answer,* has anybody promised you any reward or immunity if you testified in this case? A. No, sir, they haven't. [Deputy] And it is your understanding that you still—*even if I get Mr. Green held to answer in this case today,* there still is another case against you? A. I understand, sir." (Emphasis added.)

Hodge thereupon testified as follows: A large 16-inch screen, console type, television set (valued at $431.75) was stolen by Hodge from the home of Thomas M. Bergo, on the night of December 17, 1949; Hodge had approached defendant, whom he had known at San Quentin, about stealing a television set; defendant agreed to help him and they left in defendant's car and proceeded to drive around looking for television antennae on house tops; when they found one on the roof of the Bergo home, Hodge left the car, went to the front door where he knocked several times, receiving no answer; he then walked around the side of the house to the back door, tore off the screen and entered; he dragged the television set to the front door and at his request defendant helped him move it to the car; they tried to sell it that night and the next day. Defendant did not testify at the preliminary other than to state to the court that "the only reason I was with him was I lent him my car."

At the trial, the story told by both Hodge and defendant was that Hodge asked defendant, whom he had known at San Quentin, if he wanted to help him deliver a radio to a friend, and that he would pay him $10 for his assistance. They left the cafe where they had met in defendant's car, stopping first at a "lady's house" (the home of Mrs. Clark), and defendant drove to the Bergo home following Hodge's directions; Hodge got out of the car, knocked at the front door and receiving no answer then walked to the rear of the house. Defendant testified that he thought it was Hodge's house; that the house was unlighted during the time Hodge was inside; that Hodge came out the front door pushing the set and that he then left the car and went up on the front porch to help Hodge with it; that the instrument would not go in the car so Hodge held it on the running board while he (Green) drove back to the "lady's house." Hodge and defendant both testified that defendant did not know the set was being stolen. When they arrived at the home of Mrs. Clark defendant said that he, Hodge and "another man" carried the set into the house where Mrs. Clark and Hodge talked about it. Mrs. Clark testified that Hodge came in alone at first to talk to her about selling the set to her roomer; that she had bought another set from him for herself; that Hodge went out and came back with the defendant carrying the set; that Green took no part in the conversation. There is no evidence in the record to show that the conversation touched on whether or not the set was stolen. Defendant testified that Hodge told him he was going to pawn it as he needed the money. Mrs. Clark, Hodge and defendant all testified that the prospective purchaser was not present and that Hodge and defendant carried the set out. After leaving Mrs. Clark's home, the two men took the instrument to Hodge's room which was the last time defendant saw it.

We may say at this point that the testimony of Hodge at the preliminary hearing, if believed, was sufficiently corroborated by the testimony of defendant, and the circumstances in evidence, to support a finding that Green aided and abetted Hodge in committing the offenses. And we may also add that if Hodge had testified at the preliminary as he did at the trial Green, in all probability, would have been discharged.

The feature of the proceedings which we regard as of the utmost gravity is the one first mentioned, namely, the promise of immunity at the price of testimony which would result in Green's being bound over for trial. We do not attribute to the deputy who made that bargain on behalf of the State any unworthy motive. But the harm is just as great if the mistake was made by reason of inexperience and misguided zeal on the part of the prosecutor, as we believe was the case.

The broad question is whether a conviction may be allowed to stand where it rests chiefly upon testimony of an accomplice, given under a promise of immunity upon the condition that the testimony he is about to give is such as will result in conviction of one jointly charged with the witness. Seldom have reviewing courts been called upon to answer this simple question.

In Harris v. State, 15 Tex.App. 629, the court considered an extraordinary situation brought about by an overzealous district attorney. The grand jury was investigating a murder. Six men were brought before it and were invited by the district attorney to testify, although warned that they need not do so. Each was told by the district attorney "that one of the parties would be released from prosecution and that it would depend upon the statements of each of the accomplices (or parties) to the murder, and the benefits to be derived therefrom, as to whether or not he would be the party released and to be used as a witness." Harris was told that he would be given immunity if "the State could be best served by releasing him from prosecution, and making of him a witness," but if the interest of the State would be best served by releasing any other of the accomplices, that would be done and Harris would be held. Six men were indicted; one of them, Colonel Austin, was granted immunity and testified for the State in such manner that Harris was convicted. The reviewing court, obviously shocked by the bargain that had been made, discussed the case as follows: "Should a conviction obtained by such means as are shown in the answer of the county attorney be sustained by this court?

"Strong and irrefragible proof would be required to induce us to believe that the county attorney would, to secure a conviction, offer a pecuniary bribe to witnesses. But a bribe offered to a witness, to disclose fairly and fully all of the facts in the case, does not approach the contract contained in this answer. In a proper case, the life or liberty of a witness may be offered him, upon condition that he testify faithfully and fully to all the facts in a case in which his accomplices are involved; but we have yet to find a case in which the parties suspected were permitted to enter the list as competitors for the high prize of life or liberty, success in this singular judicial contest made dependent upon superior accomplishments in the art of testifying in such manner as to secure the conviction of his fellow competitors. Whilst the victorious party may be made to rejoice and be exceedingly happy, the result to the less accomplished—the most inexperienced, but more honest and conscientious—by such a contest, is terrible indeed. Who would like to be made the victim of such a contract? Does public justice demand a resort to such means? Will public justice sanction it? Does this great commonwealth seek to convict and punish her citizens by such unjust, unfair, yea, foul means, as are shown in the answer of the county attorney? Is Texas a tyrant and her people tyrants? Would the best, most law abiding citizen of this State be willing to live under a code of laws which would sanction such procedure?

"Has this defendant had a fair trial? We think not, nor will we sanction a conviction upon testimony coming from such a source as that of Colonel Austin. This is not a pure stream; the fountain is corrupt. He is not merely an accomplice; he is a bribed accomplice, his life or liberty being the reward—bribed, not simply to testify fully and honestly, but to exceed the rest of his competitors in testifying to facts which would be most *beneficial* to the State. Not only so, but at the very time he was upon the witness stand, the indictment against him for the murder of Gabe Austin was hanging over him. Was there any chance of escape for defendant?

"A witness thus situated by the terms of the contract and the pendency of the indictment would, we believe, swear any and all things. But be this as it may, and be this witness competent or incompetent, we, nevertheless, will not sustain a conviction obtained in such manner. Common justice revolts at such means. Such a proceeding is repugnant to the spirit and genius of our criminal codes. While it is true that in some cases the life or liberty of an accomplice is offered him upon condition that he as a witness disclose fairly and faithfully all the facts relative to the crime, a race, however, is not made and the accomplices entered, with the life or liberty of the competitors as the stake. In this race there should be some very fast running (swearing); the result being, perhaps, the life, and at least the liberty, of the swiftest, and death or the penitentiary to the losers." The judgment was reversed. In denying a rehearing the court commented upon the youth of the district attorney, described him as a young gentleman of fine ability and great vigor and energy, and acknowledged that he had made his mistake "without the slightest thought or intention to violate even the proprieties, much less the sterner demands of right, justice or law." We refer to the court's remarks on rehearing as pertinent to our statement that it is immaterial whether the grievous wrong done defendant Green resulted from want of appreciation of the gravity of the error.

The British Columbia Court of Appeal considered essentially the same grave question in Rex v. Robinson, 30 B.C. 369, 70 D.L.R. 755. The accomplice who was about to give his testimony after having made a statement to the police was informed by the court, that in accordance with the practice, he would be examined under an understanding that if he gave his evidence in an unexceptionable manner he would be recommended for a pardon. The reviewing court was of the opinion that the trial judge in the course of the examination gave the witness to understand that when his evidence was reviewed in considering a recommendation for a pardon, it would be expected that his testimony at the trial would be in conformity with the statements he had made to the police. The judgment was reversed. In the course of a clearly reasoned analysis of the situation it was said (pp. 761–762): "It is obvious that if the witness did get the impression from the Court that unless he told the same story to the Court as he did to the police, he would be executed, then his testimony was tainted beyond redemption and could not, in a legal sense, be weighed by the jury, because the witness was no longer a free agent and there was no standard by which his veracity could be tested or estimated. This is not merely a matter going to the credibility of the witness, but something fundamentally deeper, *viz.*, that by the action of the Court itself the witness was fettered in his testimony and put in so dire a position that the value of his evidence was not capable of appraisement, the situation being reduced to this, essentially, that while at the outset he was adjured to give his evidence freely and fully, yet later on he was warned that if it was not the same as he had already told the police he would be executed. Such a warning defeated the first object of justice, because what the witness should from first to last have understood was that, at all hazards, he was to tell the truth then in the witness box, however false may have been what he had said before in the police station. It is this element of uncertainty and the impossibility of determining the extent of it that makes this case so peculiar and unsatisfactory, and it cannot properly, in my opinion, be viewed as a question of credibility for the jury but one of frustration of their right to pass upon credibility. If the warnings complained of had taken place after the witness had finished his evidence, they could be said not to have had any harmful result, because they came too late to affect him, but unfortunately, if I may say so with all possible respect, the Judge went on to question him about a crucial matter—what he did with his revolver at the time of the shooting. How can anyone say if he gave a truthful answer to that question, and as to what occurred between him and the prisoner concerning it, when, in his fear, he made a fettered reply which had necessarily to be 'the same' as that which he had already told the police, if the shadow of the gallows was to be removed from him by his interrogator? * * * It cannot be denied that the accused was entitled, on every principle of natural as well as forensic justice, to this—that the witnesses brought forward against him should not have been influenced, least of all by the Court itself, however unwittingly, and that such a thing did nevertheless occur, comes clearly, in my opinion, within the expression 'that something not according to law was done at the trial'—Cr.Code, sec. 1019, R.S.C.1906, ch. 146.

"It was recognized so far back as in the severe days of 1662, in Tonge's case, 6 How.St.Tr., at p. 227 [n.], and so 'advised' (i. e., decided) by all the Judges that there should not be 'any threatenings used to them [accomplices] in case they did not give full evidence,' even in cases of treason, which were specially relentless. With every respect, I can only regard what happened here as also coming within this prohibition; whether what was said to the witness may be euphemistically styled a warning or an admonition, nevertheless it was also minatory and hence, in its practical and legal effect, indistinguishable from a threat." The court then considered whether, in the view taken of the procedure, a substantial wrong, and hence a miscarriage of justice, was occasioned at the trial, and answered this question in the affirmative.

The conclusions announced by the courts in the two cases from which we have quoted furnish a satisfactory, and we think conclusive, answer to the question in our case.

[1, 2] It is a practice which seems to be approved in all jurisdictions, if the ends of justice will be thereby served, to extend immunity to one jointly charged with crime, upon condition that he testify fully and fairly as to his knowledge of the facts out of which the charge arose. This was not the agreement made with Hodge. He was to give testimony that would satisfy the committing magistrate that Green should be bound over for trial; otherwise,

he would stand trial with Green, and in view of the testimony he was about to give, would surely have been convicted. It is not a question whether his first testimony was true or false, nor is it to be suspected that testimony was used which was known to the State to be false. We give no consideration to the fact that Hodge changed his story. This bore upon his credibility, which is of no concern in the present discussion. Whether Green be innocent or guilty he has not had a trial in accordance with the law of the land. A miscarriage of justice was occasioned through the use by the State of testimony which, because of the condition upon which immunity depended, was impure, dubious and "tainted beyond redemption."

The judgment is reversed and the cause is remanded for a new trial.

WOOD and VALLÉE, JJ., concur.

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102 Cal.App.2d 821

KELLOW v. LANE.

Civ. 17818.

District Court of Appeal, Second District, Division 3, California.

March 14, 1951.

Rehearing Denied April 3, 1951.

Hearing Denied May 10, 1951.

Action by Mildred F. Kellow against Walter F. Lane. A judgment was rendered for plaintiff in 1938 and on November 2, 1949 plaintiff moved for an order directing issuance of writ of execution after five years from date of judgment. The Superior Court of Los Angeles County, William B. McKesson, J., denied plaintiff's motion for writ of execution after five years from date of judgment and denied a motion made by plaintiff to vacate and set aside its order and for leave to renew or reconsider the original motion and plaintiff appealed. The District Court of Appeal, Bartlett, Justice pro tem., held that plaintiff failed to show that she used due diligence in attempting to enforce judgment within five years.

Orders affirmed.

1. Execution 🔑73

Affidavit by judgment creditor's office manager filed with her motion for order directing issuance of a writ of execution after five years from date of judgment which related to a conversation held by judgment creditor with defendant's former wife and his son was entirely hearsay and would be disregarded even though it had not related to any efforts made by judgment creditor to collect judgment. Code Civ. Proc. § 685.

2. Execution 🔑73

Where judgment creditor's affidavits filed with her motion for order directing issuance of writ of execution after five years from date of judgment did not tell what records were searched or when inquiries were made and she did not record an abstract of judgment, caused no writ of execution to be issued, did not examine debtor on supplementary proceedings, never communicated with him, and never levied garnishment on his wage or on his bank account, judgment creditor failed to show diligence after entry of judgment, and denial of her motion was not an abuse of discretion. Code Civ.Proc. § 685.

3. Execution 🔑73

Judgment creditor, to avail himself of statute authorizing issuance of writ of execution after five years from date of judgment, has burden of showing that he used due diligence in attempting to enforce judgment within five years, and determination of question is within discretion of trial court. Code Civ.Proc. § 685.

4. Execution 🔑73

In considering discretion of trial court in passing on motion for order directing issuance of writ of execution after five years from date of judgment, court must be guided by circumstances arising after entry of judgment and has no right to consider facts appearing at trial or any of circumstances leading up to judgment. Code Civ.Proc. § 685.

5. Appeal and error ⚷863

On appeal from denial of judgment creditor's motion for order directing issuance of writ of execution after five years from date of judgment statements in judgment creditor's affidavits and judgment debtor's counter affidavits dealing with matters occurring prior to rendition of judgment would not be considered. Code Civ. Proc. § 685.

6. Appeal and error ⚷113(1)

Where trial court's order denying judgment, creditor's motion for order directing issuance of writ of execution after five years from date of judgment was appealable order, decision of trial court refusing to change its decision and denying judgment creditor's motion to vacate its order was not an "appealable order". Code Civ.Proc. §§ 685, 1010.

See publication Words and Phrases, for other judicial constructions and definitions of "Appealable Order".

7. Appeal and error ⚷113(1)

Generally an appeal may not be taken from a nonappealable order by device of moving to vacate order and appealing from a ruling denying the motion. Code Civ. Proc. § 473.

8. Appeal and error ⚷113(1)

An appeal from an order denying a motion to vacate an appealable order or judgment will not be entertained when purpose of motion is to change decision of trial court on same facts.

9. Appeal and error ⚷113(1)

If grounds on which party sought to have a judgment vacated existed before entry of judgment and would have been available on appeal from judgment, an appeal will not lie from an order denying the motion.

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Fred N. Arnoldy, Los Angeles, for appellant.

Harold F. Pettee, Jr., Pasadena, for respondent.

BARTLETT, Justice pro tem.

This is an appeal from an order made on December 19, 1940, denying appellant's motion for an order directing issuance of a writ of execution after five years from the date of the judgment under the provisions of section 685 of the Code of Civil Procedure and also from an order made January 13, 1950, denying a motion made by appellant to vacate and set aside its order of December 16, 1949, and for leave to renew or reconsider the original motion.

[1] The judgment herein was entered on May 2, 1938. The notice of motion for an order directing issuance of execution on the judgment after a lapse of five years was filed November 2, 1949, eleven years and six months later. The affidavits accompanying the motion and upon which it was based were affidavits made by the appellant, her office manager, a former wife of the respondent and the respondent's son. The judgment in the case before us was based upon a judgment theretofore entered in 1933. The affidavit of appellant is concerned in most part with attempts to collect on this prior judgment, made in the year 1933 and the proceedings in a bankruptcy matter of respondent's which terminated on July 26, 1935. The only matter in the affidavit referring in any way to any possible efforts to collect the judgment in the action before us rendered in 1938 is the following: "That said defendant Walter F. Lane has at all times herein mentioned been a resident of the County of Los Angeles, State of California; that the records of said Los Angeles County have been searched periodically and plaintiff discovered no property assessed to said Walter F. Lane at the time of the entry of the judgment in this action or at any time since the entry of the original judgment in said Action No. 346632. That since the termination of said Bankruptcy proceedings plaintiff has made and caused to be made diligent search and inquiry at frequent and regular intervals concerning any property of said Walter F. Lane. That until on or about October 1, 1949 affiant discovered no property of said Walter F. Lane upon which execution might be levied and received no information which might have led to the discovery of any property of said Walter F. Lane, and that the issuance of a writ of execution upon said judgment

would have been futile." Following this quotation from her affidavit the appellant relates that a former wife and a son of respondent's called on her office manager on October 1, 1949, after which this affidavit was made on October 28, 1949. So far as this affidavit is concerned it gives us no facts as to what was done. She does not tell us when the records were searched, what she means by "periodically", whether these searches were made during the five year period after 1938 or as to when and of whom she made the inquiry concerning the property of respondent. She contents herself with saying that she discovered no property upon which execution might have been levied or which might have led to its discovery. It was stated in Di Corpo v. Di Corpo, 33 Cal.2d 195 at page 200, 200 P.2d 529, at page 531, in considering affidavits which contained more facts than the quoted portion of this one: "Although plaintiff alleged that 'she has been unable * * * to find any property of the defendant,' her affidavits do not show what efforts were made to determine where defendant lived after 1932 or to locate any property owned by him. She has failed to set forth facts from which the trial court might conclude that she had exercised due diligence in locating defendant's property." The affidavit of the office manager of appellant relates to no efforts whatever to collect the judgment but merely relates a conversation held by her with respondent's former wife and his son held October 1, 1949. In addition to that this affidavit is entirely hearsay and should be disregarded in any event. Southern Cal. Tel. Co. v. Damenstein, 81 Cal.App.2d 216, 221, 183 P.2d 675. The affidavit of respondent's son merely states that the account of the conversation between his mother and himself and appellant's officer manager was true and gives no information as to any efforts of appellant to collect the judgment. Neither does the affidavit of respondent's former wife. These constituted all of the affidavits on which the motion was based. Counter affidavits were filed by the respondent and the appellant replied to these by affidavits of her attorney, her office manager and respondent's former wife. However, the only statements in any of these affidavits showing any activity during the five year period after 1938 are found in the affidavit of her attorney. He states that in the latter part of 1942 or the early part of 1943 he examined the index of grantees in the Office of the County Recorder. Also "That on several occasions prior to 1942, the exact dates of which affiant cannot recall, affiant examined said Grantee indexes and also the indexes to the Los Angeles County Assessment Rolls * * *." These actions constituted a minimum of effort. The court stated in Bank of America v. Williams, 84 Cal.App.2d 562, 566, 191 P.2d 17, 20, "A serious intention to pursue its debtor would have induced some action indicative of diligence. But neglect to obtain an execution under section 681 or to make an examination of the debtor and merely to read, through a course of some 14 years as a routine matter, the lists of assessments and transfers in Los Angeles county is evidence of no diligence at all."

[2] The foregoing constitutes a statement of all of the efforts made by appellant to enforce the judgment within the five year period. The record is remarkable not for a recital of the efforts of the judgment creditor to collect the judgment, but for what it shows the appellant did not do. She did not even record an abstract of judgment, caused no writ of execution to be issued, did not examine the debtor on supplementary proceedings, although his telephone number and address were at all times in the telephone directory. She never at any time communicated with him by telephone or in writing. Although appellant knew that respondent was at all times employed by or connected with the Lane Paper Company, she never levied a garnishment on his wages or for any sums due him from that company. It appears that respondent at all times had a bank account in his own name but this bank account was never at any time levied upon nor were any inquiries made concerning it.

[3] It is the settled law of this state that a judgment creditor, to avail himself of the provisions of section 685 of the Code

of Civil Procedure, has the burden of showing that he used due diligence in attempting to enforce the judgment within five years and that the determination of this question is within the discretion of the trial court. Beccuti v. Colombo Baking Co., 21 Cal.2d 360, 132 P.2d 207; Hatch v. Calkins, 21 Cal.2d 364, 132 P.2d 210; First National Bank v. Scully, 78 Cal.App. 2d 828, 178 P.2d 835; Tucker v. Wilcox, 88 Cal.App.2d 599, 199 P.2d 24.

The respondent filed affidavits of himself and a title searcher that during this five year period he had assets which are set forth in detail, upon which execution could have been levied. We have not reviewed these affidavits for the reason that there was a complete failure on the part of appellant to show any diligence on the part of the judgment creditor after the date of the entry of the judgment and no showing of an abuse of discretion by the trial court. In Bank of America v. Williams, supra, it is said, 84 Cal.App.2d at page 568, 191 P.2d at page 21: "Appellant's argument that respondent did not aver whether he had leviable assets during the five-year period, or whether he concealed his assets, is irrelevant. The statute requires the plaintiff to show that he has exercised due diligence."

[4, 5] The greater part of appellant's affidavits and a large portion of respondent's counter affidavits deal with matters occurring in 1933 and in connection with a bankruptcy proceeding in 1935. We have not reviewed these statements here, deeming them entirely outside the scope of a consideration as to what was or was not done years afterward in an attempt to enforce a later judgment. It has always been the rule that in considering the discretion of a trial court in passing on the motion contemplated in section 685 of the Code of Civil Procedure, the court must be guided by the circumstances arising *after* the entry of the judgment and has no right to consider facts appearing at the trial or any of the circumstances leading up to the judgment. Weldon v. Rogers, 159 Cal. 700, 115 P. 464; Creditors' Adjustment Co. v. Newman, 185 Cal. 509, 197 P. 334. The rule governing us is set forth in Butcher v. Brouwer, 21 Cal.2d 354, 358, 132 P.2d 205, 207, in the following language: "* * * and in view of the legislative and judicial history of section 685, its present provisions should be construed as authorizing the court to give a creditor an execution only if, *during the five years following entry of judgment,* he exercised due diligence in locating and levying upon property owned by the debtor, or in following available information to the point where a reasonable person would conclude that there was no property subject to levy within that time." (Italics ours.)

As authority for the contention that the facts set forth in her affidavits showed due diligence on her part the appellant relies on the cases of Mongerson v. Williams, 64 Cal.App.2d 279, 148 P.2d 419 and Troendle v. Clinch, 74 Cal.App.2d 480, 169 P.2d 55. The facts in those cases are readily distinguishable from those here. In both of those cases an extraordinary amount of diligence was shown by the holder of the judgment.

[6–9] Twenty days after the decision of the court on the motion which we have been considering, appellant filed a notice of motion for leave to renew or reconsider his former motion and to vacate and set aside the order made thereon. An appeal has also been taken from the order denying this second motion. The notice of motion referred to does not comply with the provisions of section 1010 of the Code of Civil Procedure as that section requires that the grounds upon which it will be made must be stated. No grounds were stated for the reason that, as an examination of the accompanying affidavits discloses, there were no grounds for such a motion. No matters were set forth in the accompanying affidavits that were not before the trial court at the first hearing. As the prior order of the court made a few weeks before on the identical question was an appealable order as illustrated by the appeal taken from it in the case before us, the decision of the court refusing to change its decision or to vacate its order is not appealable. The following from Litvinuk v. Litvinuk, 27 Cal. 2d 38, 43, 44, 162 P.2d 8, 11, states: "Considering the appeal from the order denying the motion to vacate the judgment under section 473 of the Code of Civil Procedure, as a thing prohibited directly may not be done indirectly, it is the general rule that an appeal may not be taken from a nonappealable order by the device of moving to vacate the order and appealing from a ruling denying the motion. Estate of Spafford, 175 Cal. 52, 165 P. 1; Estate of Keane, 56 Cal. 407. Nor will an appeal from an order denying a motion to vacate an appealable order or judgment be entertained when the purpose of the motion was to change the decision of the trial court upon the same facts. Bell v. Solomons, 162 Cal. 105, 121 P. 377; Alpers v. Bliss, 145 Cal. 565, 79 P. 171. Stated differently, if the grounds upon which the party sought to have a judgment vacated existed before the entry of judgment and would have been available upon an appeal from the judgment, an appeal will not lie from an order denying the motion. Mather v. Mather, 22 Cal.2d 713, 720, 140 P.2d 808; Estate of Richards, 17 Cal.2d 259, 267, 109 P.2d 923."

The orders appealed from are affirmed.

SHUNN, P. J., and VALLÉE, J., concur.

REYNOLDS et al. v. FILOMEO et al.

No. 14597.

District Court of Appeal, First District,
Division 1, California.

March 12, 1951.

Hearing Granted May 10, 1951.*

Action by Vernon Reynolds, a minor, by his guardian ad litem, Lon R. Reynolds, and others, against John Melvin Filomeo and others, for injuries arising out of automobile collision. The Superior Court, Alameda County, A. J. Woolsey, J., rendered a judgment of nonsuit, and the plaintiffs appealed. The District Court of Appeal, Bray, J., held that under circumstances whether defendant was negligent as to lack of lights, lack of due care due to speed, or failure to avoid accident, was for jury to determine.

Judgment reversed.

1. Appeal and error 🔑927(7)

On appeal from a judgment of nonsuit, such judgment can be supported only if, disregarding conflicting evidence, and giving plaintiffs' evidence all value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, result is a determination that there is not evidence of sufficient substantiality to support a verdict in favor of plaintiffs.

2. Negligence 🔑93(8)

Driver's negligence is not imputable to guests.

3. Automobiles 🔑245(14)

In action arising out of automobile collision, where evidence clearly showed that at a point approximately 108 feet from an intersection, motorist made left turn in face of an approaching automobile, whether driver of approaching automobile had lights on, was question for jury.

4. Evidence 🔑5(2)

When nature of district, for purpose of determining speed limit applicable, is in dispute, question of its nature becomes one of fact, and is not one for judicial notice. Vehicle Code, §§ 89, 510, 511, 758.

5. Automobiles 🔑245(41)

Unless signposted, question of whether a given area comes within code definition of business district for purpose of speed regulation is matter of fact to be determined at trial. Vehicle Code, §§ 89, 510, 511, 758.

6. Automobiles 🔑245(59)

In an action arising out of an automobile collision, if district wherein accident occurred was determined by jury to be business district with statutory speed limit of 25 miles per hour therein, whether defendant's admitted failure to reduce his speed to 25 miles per hour was a proximate cause of accident was for jury. Vehicle Code, §§ 89, 510, 511, 758.

* Subsequent opinion 236 P.2d 801.

7. Automobiles 🔑245(14)

Where defendant-motorist knew that, adjoining intersection on northwest, there was an area of about 300 feet which constituted an entrance and exit from cafe, adjoining service station and a building, and knew that cafe was open for business, and saw two automobiles approaching intersection from west as he approached it from east, whether, as a prudent person, defendant-motorist should have anticipated probability that one or other of approaching automobiles, might turn either at intersection or into cafe, and whether defendant-motorist noticed that one approaching automobile had slowed down were questions for jury.

8. Automobiles 🔑245(40)

In action arising out of automobile collision, assuming accident area to be a 55 mile zone, it was for jury to determine whether defendant-motorist's testimony as to his speed was true.

9. Automobiles 🔑245(40)

In action arising out of automobile collision, taking into consideration necessary reaction time it would take defendant-motorist to realize necessity for acting, skid mark of 24 feet, force of impact, injuries to his automobile, and other automobile, it could not be said as matter of law, that defendant-motorist was not exceeding 55 miles per hour at time of collision.

10. Automobiles 🔑244(35)

It does not require direct testimony to overcome motorist's testimony, of his speed, if indirect or circumstantial evidence does so.

11. Automobiles 🔑242(4)

Circumstances may overcome the presumption that motorist was obeying law in relation to speed.

12. Trial 🔑142

Even though all facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts, there remains in case a question of fact to be determined by jury.

13. Negligence 🔑12

No one suddenly confronted with an unexpected peril is responsible for omitting precautions which hindsight might show would have avoided accident, but is required to do only what a prudent person would do under circumstances.

14. Negligence 🔑136(14)

In an emergency where one is confronted with unexpected peril, it is a question for trier of fact to determine whether person acted with reasonable care under all circumstances.

15. Automobiles 🔑245(49)

In action arising out of a collision wherein automobile traveling west on a clear night, collided with an eastward traveling automobile which turned in front of him, whether a reasonably prudent person, after time when a jury would find that westward traveling motorist should have realized danger, and would or would not have attempted to turn his automobile to avoid accident, or would have succeeded in avoiding it had he turned, were questions for jury.

◆

Brown, Smith & Ferguson and Jacqueline Taber, all of Oakland, for appellants.

Clark & Heafey and Richard Belcher, all of Oakland, for respondents.

BRAY, Justice.

Plaintiffs appeal from a judgment of nonsuit in an action for personal injuries, tried before a jury.

Question Presented.

Is there any substantial evidence of negligence of defendant (a) as to lack of lights, (b) as to lack of due care due to speed, and (c) as to failure to avoid the accident.

Facts.

[1] "As this is an appeal from a judgment of nonsuit, such judgment can be supported only if, 'disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate in-

ference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.'" Andre v. Allynn, 84 Cal. App.2d 347, 348, 190 P.2d 949, 950.

The facts most favorable to plaintiffs will be set out, but, where necessary in order to understand fully the case, the testimony of both sides will be given.

Originally the complaint included as a defendant Joseph Brenner, the driver of the car in which the plaintiffs were riding, charging that he turned in front of defendant's oncoming Buick with "a reckless disregard of probable consequences and of the safety of these plaintiffs." Prior to the trial the action was dismissed as to him without prejudice. He appeared as a witness for plaintiffs.

On the night of November 5, 1948, at approximately 11:15, Joseph Brenner was driving his Ford coupe easterly on highway 24 towards Concord. The highway was divided by a white line into two lanes, each twelve feet wide. Brenner was a good driver, the car was in good shape mechanically, the windshield was unobstructed, and the headlights were lit. Plaintiff James Reynolds sat beside the driver, while plaintiff Vernon was sleeping on the rear seat, and therefore was unable to give any version of the accident. At the same time defendant John T. Filomeo[1] was driving his Buick westerly on the same highway, at a speed which he estimated to be 45 to 50 miles an hour. The atmosphere was clear and the surface of the highway dry. No other traffic was approaching from the east. The evidence is equivocal as to whether there was a car following the Ford approximately a quarter of a mile to its rear. There was a car ahead of the Ford which passed the Buick approximately at the intersection of highway 24 and Meadow Lane. At and westerly of this intersection, and on the north side of the highway (the opposite side from that on which was the Ford) was an area fronting the "Four Corners Cafe," where there was a lighted neon sign and a lighted billboard. As the Ford approached this area, either Brenner or James said, "Let's go in here to the cafe." Brenner, intending to turn left across the highway and enter the off-street parking area fronting the cafe, slowed the Ford to ten miles per hour. James turned to look to the rear, and just before the turn was started he looked up the road and saw no car approaching. When asked if he was looking up the road for approaching vehicles he stated, "Not particularly, although I always look for them, I knew he [Brenner] would look so I just glanced up the road. Q. In other words, you were looking for him to look for vehicles approaching in the opposite direction, is that right? A. Yes." Brenner looked up the highway "and didn't see a thing." Brenner "thinks" he gave a left-hand signal. He turned left and just as the front wheels of the Ford reached the northern border of the highway strip the Buick struck it slightly to the rear of its right door. The occupants of the Ford were thrown out and plaintiffs severely injured.

Defendant was familiar with the intersection and the buildings surrounding it as he passed it daily going to and from work. As he was about 125 yards east of the intersection, he saw the headlights of two cars approximately 100 feet apart, coming toward him in the eastbound lane. When he reached the intersection the first car passed him and the Ford was approximately 150 feet in front of him. He could not estimate its speed. He did not slacken speed at or before the intersection. When he was twenty to fifty feet from the Ford he claims it suddenly turned in front of him. He did not sound his horn, nor attempt to pull to either side. He applied his brakes and skidded 24 feet straight forward to the point of impact (approximately 108 feet west of the intersection). His headlights were lighted and his car in good mechanical condition. The Ford was thrown forward and in a semicircle by the force of the collision, coming to rest off the road and facing south. Brenner did not see the Buick before it struck. James did not see it until it was about a foot away, when "all at once I noticed this light to my right." The court granted a nonsuit on the ground that there was no evidence of defendant's negligence.

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[1] Mrs. Filomeo was joined as a defendant because of alleged joint ownership of the car. Unless otherwise noted, "defendant" will refer to John Filomeo.

Was Defendant Negligent?

(a) *Lights.*

[2, 3] Plaintiffs first contend that there was evidence to support a finding that the headlights of defendant's car were unlighted. There can be no question that Brenner was negligent unless defendant was driving with his lights off. The evidence clearly shows that at a point approximately 108 feet from an intersection he made a left turn in the face of an approaching car. Brenner's negligence, of course, is not imputable to plaintiffs, his guests. King v. City of Long Beach, 67 Cal.App.2d 1, 153 P.2d 445. Plaintiffs contend that the testimony of James that, although he was not particularly looking for approaching vehicles, he looked up the road and saw none, and Brenner's testimony that he, too, looked and did not see anything, and that then practically at the instant of collision James saw the lights, would justify a jury in inferring that defendant, although he testified to the contrary, was driving with his lights off and suddenly switched them on. Therefore, say they, that question should have been left to the jury. We find it difficult to distinguish this situation from that in railroad cases where it has been held that where in spite of positive testimony that a signal warning was given, witnesses at the scene testify that they did not hear it, their failure to hear "is some evidence that no such signal was given" and the resolving of the conflict is for the jury. Thompson v. Los Angeles & S. D. B. Ry. Co., 165 Cal. 748, 752, 134 P. 709. In Saphire v. Los Angeles Transit Lines, 99 Cal. App.2d 880, 222 P.2d 956, it was held that the testimony of the respondent that no bell was sounded was sufficient. To the same effect, McKinley v. Southern Pacific Co., 80 Cal.App.2d 301, 306, 181 P.2d 899. The court should have left to the jury the question of whether defendant's lights were on.

(b) *Speed.*

Plaintiffs contend first that the area where the "Four Corners Cafe" stands is a business district as defined by section 89 of the Vehicle Code, and therefore the speed limit is 25 miles an hour. The testimony of the engineer as to the buildings in the vicinity could bring the area within the definition of a business district as set forth in section 89. Section 511 of the Vehicle Code provides that the prima facie speed limit in a business district is 25 miles per hour. This section further provides that excess of that speed is prima facie unlawful unless defendant establishes that such speed did not constitute a violation of the basic rule of section 510, which reads: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." Prior to 1947 section 758 of the Vehicle Code provided that every highway should be conclusively presumed to be outside of a business or residence district unless its nature was clearly shown and it was signposted as required by the code. In that year, the section was amended and now reads: "In any action involving the question of unlawful speed of a vehicle upon a highway which has been signposted with speed restriction signs of a type complying with the requirements of this code, it shall be presumed that existing facts authorize the erection of such signs and that the prima facie speed limit on such highway is the limit stated on such signs. This presumption may be rebutted."

[4] Plaintiffs contend that the 25 mile an hour speed limit applies if in fact the number of buildings in the area brings it within the definition of section 89. Defendant contends that it applies only if that condition exists and the area is signposted. It has been held that "when the nature of the district is in dispute the question becomes one of fact and is not one for judicial notice." Noble v. Kertz &

Sons Feed & Fuel Co., 72 Cal.App.2d 153, 158, 164 P.2d 257, 259.

[5, 6] The Noble case, supra, Cunningham v. Cox, 126 Cal.App. 685, 15 P.2d 169, and Cavalli v. Luckett, 40 Cal.App.2d 250, 104 P.2d 708, are cited by defendant for the proposition that unless signposted the area cannot be considered a business district even though it has the required number of buildings. These cases are not in point as they are based on section 758 (and its predecessor section) as it read prior to the 1947 amendment. By the amendment, the conclusive presumption was done away with and a rebuttable presumption substituted if the area is signposted. By this action of the Legislature, it is obvious that unless signposted the question of whether or not a given area comes within the code definition of business district is a matter of fact to be determined at the trial. The highway patrolman's testimony that the area was in a 55 mile zone was his legal conclusion on the subject and was not binding on the jury, whose duty it was to determine that very question. His testimony that there were no speed restriction signs in the area was, of course, pertinent. Even under the old law the mere fact of signposting an area was not sufficient to establish it as a business district. It was necessary for the jury to find additionally that the necessary number of buildings existed to bring it within the code definition. Noble v. Kertz & Sons Feed & Fuel Co., supra; McGough v. Hendrickson, 58 Cal.App.2d 60, 136 P.2d 110; see cases collected in 2 Cal.Jur. 10-yr. Supp., p. 274, § 182. The amendment concerning signposting in nowise affected this requirement. It merely does away with the presumption as to the character of the area when not signposted. Thus, the character of the district should have been left to the jury to determine, whether, first, it was a business district, and secondly, if it was whether defendant's admitted failure to reduce his speed to 25 miles per hour was a proximate cause of the accident.

[7] Plaintiffs also contend that, assuming the area to be a 55 mile zone, it was not prudent and was a violation of the basic speed law for defendant, who knew the character of the area, to drive into it at the speed he testified he was driving, forty-five to fifty miles per hour. Defendant knew that adjoining the intersection on the northwest was an area of about 300 feet which constituted an entrance to and exit from the Four Corners Cafe, an adjoining service station and a building. Except for these structures the area is open farming country. He knew, of course, that the restaurant was open for business at that time of night. The lights showed that it was. Defendant admittedly saw two cars approaching the intersection from the west as he approached it from the east. Whether or not as a prudent person he should have anticipated the probability that one or the other might turn either at the intersection or to the cafe was a question for the jury. The area of the cafe and service station was well lighted. Whether defendant should have noticed that the approaching Ford had slowed down, if it did, was likewise for the jury to determine.

[8, 9] Again, assuming the area to be a 55 mile one, it was for the jury to determine whether defendant's testimony as to his speed was true. Taking into consideration the necessary reaction time it would take defendant to realize the necessity for acting, the skid of 24 feet, the force of the impact, the injuries to both cars and all the circumstances, it cannot be said as a matter of law that defendant was not exceeding 55 miles per hour.

[10–12] Defendant points out that there was no direct testimony that his speed was different than he testified it was, and cites Corcoran v. Pacific Auto Stages, Inc., 116 Cal.App. 35, 2 P.2d 225, to the effect that it will not be presumed that defendant was violating the law. It does not require direct testimony to overcome defendant's testimony if the indirect or circumstantial evidence does so. Moreover, such circumstances may overcome the presumption that defendant was obeying the law. There were circumstances here by which the jury might have so concluded. As said in Spolter v. Four-Wheel Brake Service Co., 99 Cal.App.2d 690, 222 P.2d 307, 310, quoting from Mah See v. North American Accident Ins. Co., 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123: "'This court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury * * *.'"

Failure To Avoid the Accident.

[13–15] Of course, no one suddenly confronted with an unexpected peril is to be held responsible for omitting precautions which hindsight might show would have avoided the accident. He is required only to do what a prudent person would do under the circumstances. "In every such emergency it is a question for the trier of fact to determine whether the person acted with reasonable care under all the circumstances." De la Motte v. Rucker, 55 Cal.App.2d 226, 233, 130 P.2d 444, 448. Whether or not defendant could have avoided the accident depends partly upon how much of his story the jury might believe. Moreover, we cannot say, as a matter of law, that under the circumstances of this case, a reasonably prudent person, after the time when a jury would find that defendant should have realized the danger, would or would not have attempted to turn his car in an endeavor to avoid the accident, or would have succeeded in avoiding it had he turned his car. These were all questions for the trier of the facts. See Betschart v. Steel, 61 Cal.App.2d 517, 143 P.2d 81. Cases like Curry v. Williams, 109 Cal. App. 649, 293 P. 623; De la Motte v. Rucker, supra, 55 Cal.App.2d 226, 130 P.2d 444; Sinclair v. Harp, 18 Cal.App.2d 167, 63 P.2d 876, where the accident was caused by one vehicle turning abruptly in front of an oncoming car are not in point here as their facts are not similar. In Podeszwa v. White, 99 Cal.App.2d 777, 222 P.2d 683 where the defendant was held liable, the facts concerning the failure of the defendant to swerve his truck and thereby avoid the accident were more nearly similar to those in our case. However, each case depends upon its own facts and the inferences that may reasonably be deduced from them.

If we were permitted to weigh the evidence on an appeal of this kind, we possibly might find that the preponderance of the evidence shows no negligence of defendant. However, there is "evidence of sufficient substantiality to support a verdict in favor of the plaintiff." Andre v. Allynn, supra, 84 Cal.App.2d 347, at page 348, 190 P.2d 949, at page 950.

The judgment is reversed.

PETERS, P. J. and WOOD, J., concur.

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103 Cal.App.2d 12

In re HARRISON'S ESTATE.

COOK v. SCHEINMAN.

Civ. 14692.

District Court of Appeal, First District,
Division 1, California.
March 21, 1951.

Proceeding in the matter of the estate of Marguerite Harrison, also known as Marguerite Atkinson Harrison, deceased. Willis Cook filed objections to second and final account of Norman L. Scheinman, administrator, with the will annexed. The Superior Court in and for the County of Santa Clara, Byrl R. Salsman, J., entered a decree of settlement of second and final account and of distribution and an order denying motion to vacate such decree, and Willis Cook appealed. The District Court of Appeal, Bray, J., held that trial court did not err in denying objections to administrator's account.

Order and decree of settlement of second and final account and petition for distribution affirmed.

1. Executors and administrators 🔑510(2)

An order denying motion to vacate decree of settlement of second and final account of administrator with will annexed and of distribution was not appealable.

Code Civ.Proc. § 963, subd. 3; Probate Code, § 1240.

2. Executors and administrators ⚷504(2)

A residuary legatee in an estate in which there was no residue was a "person interested in the estate" so as to be entitled to contest account of administrator with will annexed, notwithstanding that there were no assets presently distributable to him and that his only possibility of realizing on his bequest was from after-discovered property, if any. Probate Code, § 927.

See publication Words and Phrases, for other judicial constructions and definitions of "Person Interested In the Estate".

3. Appeal and error ⚷966(1)
Continuance ⚷7

The granting or refusing of a continuance is a matter which rests largely in discretion of trial court, and trial court's action will not be set aside by reviewing court unless it is clearly shown to have been abused.

4. Continuance ⚷44

Refusal of contestant's request for continuance of hearing in settling account of administrator with will annexed "for several weeks" for reasons of unfamiliarity of contestant's counsel with the account, counsel's inability to be in court on date set for the hearing, and fact that contestant "is also unable to proceed", was not abuse of discretion, where no affidavits were filed, and no showing made in support of reasons given for the request. Code Civ.Proc § 595.

5. Continuance ⚷48

One of factors in determining whether there was an abuse of discretion in denying contestant's request for continuance of hearing in settling account of administrator with will annexed was question of whether contestant's objections to the account were meritorious. Code Civ.Proc. § 595.

6. Executors and administrators ⚷504(2)

Former executor of estate, who was also a residuary legatee, and who had been removed as executor because of shortages in his account, was in no position to urge that estate should be kept open to require administrator with will annexed to sue a bank to recover money which former executor had paid to bank, in fraud of the estate, solely to reduce judgment against former executor which estate had obtained because of that fraud.

7. Executors and administrators ⚷497

Court has duty, even without objections, to allow to administrator with will annexed and his attorney as extraordinary fees only such sums as are reasonable.

8. Executors and administrators ⚷501

Evidence failed to show that allowance to administrator with will annexed of $9,000 and to his attorney of $4,000 for extraordinary services were not reasonable allowances.

◆

Ernest Spagnoli, San Francisco, for appellant.

Rea, Jacka & Frasse, San Jose, for respondent.

BRAY, Justice.

Appeal from (1) decree of settlement of second and final account and of distribution; (2) order denying motion to vacate such decree.

[1] The order denying the motion to vacate is not appealable. Lutz v. Christy, 67 Cal. 457, 8 P. 39. This decision was based on section 963, subdivision 3, of the Code of Civil Procedure. In 1931 section 1240 of the Probate Code was enacted providing for appeals in probate. It does not provide an appeal from a decree of this type, so the rule is the same. Linstead v. Superior Court, 17 Cal.App.2d 9, 61 P.2d 355; Gladding v. Superior Court, 7 Cal.2d 408, 60 P.2d 857; see also In re Estate of Lopez, 79 Cal.App.2d 399, 179 P.2d 621.

Questions Presented.

1. Is a residuary legatee in an estate in which there is no residue a "person interested in the estate" under section 927 of the Probate Code? 2. Did the court abuse its discretion in refusing to continue the hear-

ing of the final account and petition for distribution? 3. Did the court err in denying the objections to the account?

Facts.

Appellant Willis Cook is a residuary legatee under decedent's will. He was named executor and from 1943 to 1946 acted as such. Due to shortages in his accounts he was removed. Norman L. Scheinman was appointed administrator with the will annexed, and recovered a judgment of $29,000 against Cook for the estate. Cook was convicted of embezzling some $11,569.32 of this amount and was imprisoned at San Quentin. On February 21, 1950, Scheinman filed his second and final account as administrator and petition for distribution, which was set for hearing for March 10. One James Foley was the attorney for the executor during Cook's administration of the estate, and notice of the hearing was served upon him. Foley mailed the notice to Cook at San Quentin, and it was received by him about the 1st or 2nd of March. About that time Cook was released (his brief says on or about March 1st). Cook in a letter requested Foley to act for him but the latter declined (the date of this does not appear). On March 9th, Cook consulted his present attorney who prepared for him "Exceptions and Objections to Second and Final Account, Report and Petition for Distribution," also a letter to the superior court requesting a continuance of the hearing set for March 10th "for several weeks," for the reason that counsel was not familiar with the account and would be unable to be in court on that day. It also stated: "Mr. Cook, just recently released from San Quentin, is also unable to proceed * * *."

On the morning of the 10th, Cook filed the exceptions in the clerk's office and presented the letter to the judge in chambers. The latter suggested that it be presented to him in open court. When the matter was called, Cook was present in court, requesting a continuance. Whether the letter was again presented is not clear. Cook, in the hearing on the motion to vacate, swears that it was; the attorney for the administrator swears that it was not; and the judge does not recall. (The hearing was not reported.) At the hearing of the account Cook was not sworn, but upon questioning from the bench, discussed at least one of the objections in his exceptions to the account. The court settled the account as presented, expressly disallowing appellant's objections, and ordered the estate on hand to be distributed under the terms of the will to the three legatees. It appears that the assets of the estate were not sufficient to satisfy these legacies. Appellant does not question the distribution as made.

Thereafter appellant moved to vacate the order settling the account and of distribution on the ground that his request for continuance of the hearing was not granted and because the court had refused to order the administrator to recover certain moneys from the bank. This motion was denied. Before notice of appeal was filed the administrator was discharged. The attorneys who had represented the administrator appear on this appeal as amici curiae.

1. Is Appellant An Interested Person?

[2] Section 927 of the Probate Code provides: "Any person interested in the estate may appear and file written exceptions to the account * * *." Respondent contends that appellant is not such person for the reason that, assuming appellant's objections to the account are sustained, there still would not be sufficient money to pay the specific legacies. Therefore, there would be no residue for appellant to take. Appellant's only claim, then, to being an interested person, can be that although no assets may be presently distributable to him, the possibility of his realizing on his bequest, from after-acquired property, if any, is enhanced by any saving to the estate his objections may affect. In Re Estate of Casner, 1 Cal.App. 145, 81 P. 991, 992, the court said that the decree of the probate court settling an account will not be disturbed on appeal "unless the appellants show that *their* interests in the estate have suffered in some way by reason of the findings or decree * * *." There appellants were complaining that the executor had not collected interest on certain debts due the estate, which, if collected, would have gone to the widow who was not

complaining. In Re Estate of Brown, 24 Cal.App.2d 573, 75 P.2d 658, the appellant had under the will "only a future contingent interest in the estate", 24 Cal.App.2d at page 574, 75 P.2d at page 659 (the exact nature of this interest does not appear). The court said, referring to section 927: "* * * the language used therein appears to be sufficiently broad to include within its scope any person named as a beneficiary in the will of the deceased." 24 Cal.App.2d at page 575, 75 P.2d at page 659. While in our case the possibility of there being after-discovered property is probably remote, the law should be extremely liberal in not depriving of his day in court a person whose actual interest might possibly attach in the future. Particularly is this so in view of the statement in Garwood v. Garwood, 29 Cal. 514, 520: "* * * any doubt as to the question of interest ought to be resolved in favor of the petitioner; and however remote or contingent his interest may be, or, in other words, if he has the appearance of an interest, his right to contest ought not to be denied." Being named in the will, appellant should be entitled to his voice in the proceedings.

2. No Error In Refusing Continuance.

[3, 4] The reasons given in the letter requesting the continuance were unfamiliarity of counsel with the account, his inability to be in court on March 10th, and that Cook "is also unable to proceed." No affidavits were filed, and no showing made as to why counsel was unfamiliar with the account, and particularly why he could not be in court that day; nor why Cook would be unable to proceed. No showing for continuance as required by section 595 of the Code of Civil Procedure was attempted. Cook had been the executor of the estate from 1943 to 1946, and, although confined later in prison, must have had some familiarity with the affairs of the estate. Formal objections to the account were filed. While these objections stated that the three objections he was making therein were "amongst others that he will supply later and is not able at this time to supply" because he had recently been released from prison, Cook testified on the motion to vacate that his principal objection to the account, at the hearing of the account and then, was the item of $11,569 which he contended the administrator should recover from the bank. (It will be considered later.)

In his brief, appellant claims that he desired an opportunity to apply to the court for executor's fees and fees for his attorney. Whether an executor who embezzles from the estate is entitled to executor's fees might be an interesting question. Moreover, the record fails to show that the executor's former attorney was seeking fees. He knew of the hearing of the account. However, so far as we can determine from the record the attention of the probate court was never called to this matter of fees. Again, the time to which a continuance was requested was delightfully vague—"for several weeks."

It is well settled that the granting or refusing of a continuance is a matter which rests largely, if not wholly, in the discretion of the trial court, and that court's action will not be set aside by a reviewing court unless it is clearly shown to have been abused. Jones v. Green, 74 Cal.App.2d 223, 168 P.2d 418. We see no such abuse here.

3. Objections To The Account.

[5, 6] One of the factors in determining abuse in denying a continuance is the question of whether appellant's objections were meritorious. See Jones v. Green, supra, 74 Cal.App.2d at page 230, 168 P.2d 418. The court here properly denied the objections. The one on which appellant principally relies deals with a claimed payment by Cook when he was executor to the Anglo-California National Bank of the sum of $11,569.32. There is no evidence in the record concerning this item. Coupling together his statements in his objections and in his brief, it appears that appellant contends that when executor, he instructed a title company to pay to the bank from estate moneys in its hands, that amount in payment of appellant's personal promissory note. This

note was secured by a chattel mortgage on estate cattle which had been branded with Cook's personal cattle brand. While Cook contends that the money evidenced by the note was used by him for the conduct of a ranch belonging to the estate, it appears that his embezzlement conviction was based on this item. He now contends that the administrator should compel the bank to restore this sum to the estate. Obviously, if the money was used, as he claims, to pay an estate indebtedness, there is no reason why the money should be repaid to the estate. Respondent, without giving any detail of the facts, contends that this money is not legally recoverable from the bank; that it may be barred by the statutes of limitation, and that appellant has failed to point out how it is legally recoverable. Appellant has mentioned no theory upon which this money is legally recoverable. As there is no evidence before us as to just what the true situation is, we likewise are unable to determine that the court's action in refusing to require the administrator to proceed against the bank is erroneous. We might point out, however, that the legatees other than appellant, none of whom received their full legacies, are not complaining. Moreover, appellant's reason for demanding a recovery from the bank is that such a recovery would reduce the $29,000 judgment which the estate holds against him, pro tanto. Just why the court should have ordered the estate to be kept open and the administrator to sue the bank for moneys knowingly paid it by appellant, in fraud of the estate, solely to reduce the judgment against appellant which the estate obtained because of that fraud, is not clear. As the others interested in the estate are not complaining, appellant is in no position to complain.

In his brief, appellant states that the only remedy now open to him is for him to sue the bank (if the parole board will permit). Such a suit ought to be quite interesting—one who steals money, suing to recover for himself, the stolen money.

Extraordinary Compensation.

[7,8] The other items objected to are allowances to the administrator of $9000 and to the attorney of $4000—for extraordinary services. The other legatees requested the court in writing to allow these sums. There is nothing in the record before us from which we can determine whether or not they are reasonable. It was the duty of the court, even without objections by appellant, to allow as extraordinary fees only such sums as are reasonable. In the absence of a showing to the contrary, we must assume that the probate court properly determined the matter. It is reasonable to assume, too, that as a result of appellant's defalcation as executor, both the administrator and the attorneys were required to perform extraordinary services. Again, we probably can assume the reasonableness of the charges from the fact that they actually came out of the shares of the legatees who approved them. In his brief, appellant does not contend that the evidence did not support the court's determination on this subject.

It is interesting to note that respondent claims that even if the moneys paid the bank and the amounts allowed for extraordinary services were returned to the estate, they still would not be sufficient to pay the total of the specific legacies. As the record does not show how much the amounts distributed to the legatees fall short of the amounts bequeathed them, we have no way of verifying this.

The order and decree of settlement of the second and final account and petition for distribution is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

103 Cal.App.2d 129

DALLMAN SUPPLY CO. v. SMITH-BLAIR, Inc.

Civ. 14472.

District Court of Appeal, First District,
Division 2, California.

March 28, 1951.

Rehearing Denied April 27, 1951.

Hearing Denied May 24, 1951.

The Dallman Supply Co., a corporation, brought action against Smith-Blair, Inc., a corporation, for a declaratory judgment as to the rights of the parties under a contract whereby plaintiff was to sell defendant's products on commission. The Superior Court, in and for the City and County of San Francisco, Sylvian J. Lazarus, rendered a judgment and both parties appealed. The District Court of Appeal, Dooling, J., held that letter which plaintiff had written to defendant and on which the parties had acted, was the contract of the parties though never signed by defendant.

Judgment affirmed.

1. Contracts 🔑35

Where seller of plumbing supplies sent to manufacturer of water works equipment a letter stating that in accordance with terms of verbal agreement seller was to act as sole distributor in certain area in the state and would receive a commission of 20 per cent on all orders, and that agreement could be terminated at any time after 30 day written notice from either party, and requested that manufacturer let seller known by return mail if such terms did not meet with manufacturer's approval, and parties acted under such agreement for about three years, court properly found in declaratory judgment action that letter was the contract of the parties, though never signed by manufacturer.

2. Contracts 🔑35

The receipt and acceptance by one party of a paper signed by the other only, and purporting to embody all terms of contract between the two, binds the acceptor, as well as the signer, to the terms of the paper.

3. Appeal and error 🔑882(3)

Where plaintiff consistently took the position throughout trial of declaratory judgment action that letter embodied entire contract between the parties, and defendant attempted to meet that issue with its proof, and motion was made by defendant to amend its answer to deny contract as alleged in the complaint, and entire trial proceeded on that theory, defendant would not be permitted to adopt a different theory on appeal.

4. Contracts 🔑273

Defendant could not continue contract in force for its benefit and expect to escape its burdens.

5. Contracts 🔑244

Acceptance by plaintiff of smaller installments of commissions for selling defendant's manufactured products than were due plaintiff under contract, bound plaintiff as to those installments, but did not effect a modification of the written contract as to future payments.

6. Contracts 🔑175(1)

Where contract whereby plaintiff was to sell defendant's manufactured products on commission provided that contract would be terminated on 30 days' notice by either party and cast on defendant the obligation to repurchase such products of defendant as plaintiff should have on hand, and defendant did not give plaintiff 30 days' notice of termination of contract but on September 4, 1947, demanded redelivery of products by plaintiff to defendant's plant, and parties advised court that issue which arose out of the offer of September 4, 1947 to repurchase had been settled and adjusted, it would be inferred that parties elected to treat September 4, 1947 as date of termination of contract.

7. Appeal and error 🔑901

Burden was on appellant to present a record affirmatively showing error asserted on appeal.

* * *

David Livingston, Louis F. DiResta, San Francisco, for plaintiff-appellant.

J. W. Coleberd, South San Francisco, R. A. Rapsey, San Bruno, Richard P. Lyons, South San Francisco, for defendant-appellant.

DOOLING, Justice.

Plaintiff Dallman Supply Co. is a corporation engaged principally in the business of selling plumbing supplies. It is the successor of a partnership which did business under the same name. Defendant Smith-Blair, Inc., is a corporation engaged in the manufacture of waterworks equipment. In 1944 Dallman Supply Co., then a partnership, engaged one Harden as manager of a waterworks department and negotiations were entered into with defendant for an exclusive agency in northern California for the distribution of defendant's products. On October 20, 1944, acting for plaintiff, Harden sent a letter to defendant which, omitting address and signature, reads:

"Please enter the attached order for materials for our stock of Sacramento.

"In accordance with the terms of our verbal agreement, we are to act as your sole distributor in Northern California as far south as San Luis Obispo on the West and South to Bakersfield on the East, and will receive a commission of 20% on all orders, whether they are placed through us or sent direct to you, with the exception of the California Water Service Company unless the California Water Service Company specifically wish to place their orders with us along with other materials, in which case we reserve the right to do business with them on an equal basis with yourselves.

"It is further understood that this agreement can be terminated at any time after a thirty day written notice from either party, if in your opinion we are not sufficiently covering the territory to increase the volume of business. In such case, any stock which we may have will be returnable to you at the current resale price less our discount.

"If the above does not meet with your approval, please let us know by return mail. Assuring you of our full cooperation at all times, we are".

Following the receipt of this letter by defendant plaintiff's predecessor engaged in the sale of defendant's products in northern California and both parties proceeded for a period to perform in accordance with its terms, defendant accounting to plaintiff's predecessor for commissions on its products sold directly by it in that territory to others than California Water Service Company at the specified rate of 20%. Thereafter defendant commenced to express dissatisfaction to Harden at the volume of sales of its products being made by Dallman Supply Co., accounted for commissions allowed on sales made directly by defendant at a reduced rate and such lower commissions were accepted by Dallman Supply Co. without protest.

Finally, some time after the incorporation of plaintiff, defendant over plaintiff's protests refused to pay any further commissions on sales made directly by it and on September 4, 1947 defendant sent a letter to plaintiff offering to buy back from plaintiff "all merchandise heretofore * * * sold to you by us, and now in your possession, but excepting therefrom all such parts of said merchandise as are in a damaged condition and also all such parts * * * as are now obsolete by reason of improved and different designs * * * We reserve the right to determine what parts of such merchandise are obsolete by reason of said changes in design." The letter demanded delivery to defendant's plant of such merchandise by September 18, 1947 and the retransportation of rejected merchandise from defendant's plant all at plaintiff's expense. No formal notice of the termination of the contract was ever given by defendant to plaintiff.

Plaintiff thereupon commenced this action for declaratory relief and an accounting of unpaid commissions on sales made directly to customers in northern California by defendant.

The court found that the letter of October 20, 1944 was the contract of the parties and that said contract remained in full force and effect until September 4, 1947, and judgment was given plaintiff in the sum of $8,473.21 for commissions at the rate of 20% on sales made by defendant directly to customers in northern California prior to September 4, 1947 for which defendant had not theretofore accounted to plaintiff, after deducting an admitted offset.

The court made the following finding which is not attacked by either party:

"The Court is advised that the parties hereto have, by an agreement entered into subsequent to the commencement of this action, settled and adjusted their dispute with respect to all and any rights of Dallman to return said stock of goods to Smith-Blair and all and any obligations of Smith-Blair to accept the return of said goods from Dallman and pay Dallman for the return thereof. Consequently it is not necessary to make any findings with respect to this aspect of the controversy between the parties."

Both parties have appealed from the judgment.

Defendant's Appeal.

[1, 2] On its appeal defendant attacks the finding of the trial court that the letter of October 20, 1944 quoted above is the contract of the parties. It is true that defendant did not sign this letter, but there is ample evidence from which the court could find that defendant accepted the letter and acted upon it. "It is a settled rule that the receipt and acceptance by one party of a paper signed by the other only, and purporting to embody all the terms of a contract between the two, binds the acceptor, as well as the signer, to the terms of the paper." Frankfort etc. Co. v. California etc. Co., 28 Cal.App. 74, 82; Remsberg v. Hackney Manufacturing Co., 174 Cal. 799, 802; Barlow v. Frink, 171 Cal. 165, 170; Fidelity etc. Co. v. Fresno Flume etc. Co., 161 Cal. 466, 473; Bloom v. Hazzard, 104 Cal. 310; Morgenstern v. Bailey, 29 Cal.App.2d 321, 324; Jewelry Co. v. Provident Loan Assn., 6 Cal.App.2d 506, 510–511.

The complaint alleged that "on or about October 20, 1944 defendant entered into an oral and written contract" with plaintiff's predecessor, setting out the terms of the letter not *in hæc verba* but according to its legal effect. This allegation was admitted in the answer filed. On the trial plaintiff insisted that the letter embodied all of the terms of the contract and defendant attempted to prove an additional oral term of the agreement that Dallman Supply Co. was to keep at least fourteen salesmen in the territory who would canvass the territory once every two weeks. It is defendant's theory that the evidence established this oral agreement and its breach by plaintiff. At the close of the trial defendant moved to amend its answer to deny the contract as alleged in the complaint and over plaintiff's objection such leave to amend was granted. Thereafter plaintiff moved to vacate this order and this motion was denied. No amendment to the answer was actually filed.

Defendant now argues that by its admission of the allegation of the complaint that the contract was *oral* and written it stands as an admitted fact that the letter did not embody the entire contract. Plaintiff counters that by obtaining leave to amend its answer to deny this allegation defendant elected to put the allegation that the contract was oral and written in issue, even though no formal amendment to the answer was afterwards filed. Greenwood v. Greenwood, 112 Cal.App. 691.

[3] It is sufficient to resolve these contentions that a reading of the record clearly shows that throughout the trial plaintiff consistently took the position that the writing embodied the entire contract and defendant attempted to meet that issue with its proof. Defendant's motion to amend its answer to deny the contract as alleged in the complaint was a further recognition that this issue was in the case. The entire trial having proceeded on that theory under settled principles defendant will not be permitted to adopt a different theory on appeal. 2 Cal.Jur., Appeal and Error, sec. 69, p. 239 et seq.

[4] It may also be noted that the letter itself made express provision for the subject of failure to sufficiently cover the territory in the sentence reading: "It is further understood that this agreement can be terminated at any time after a thirty day written notice * * * if in your opinion we are not sufficiently covering the territory to increase the volume of business." Defendant, for whatever reason

it may have had, elected not to terminate the contract. It could not at the same time continue the contract in force for its benefit and expect to escape its burdens.

[5] Defendant further argues that by accepting smaller commissions than those called for by the contract plaintiff impliedly consented to its modification. No modification of the contract was pleaded in defendant's answer, but apart from that while the acceptance of smaller instalments than those due it bound plaintiff as to those instalments, the acceptance of those lesser amounts would not effect a modification of the written contract as to future payments. Stoltenberg v. Harveston, 1 Cal.2d 264, 266–267; Sinnige v. Oswald, 170 Cal. 55, 57; Taylor v. Taylor, 39 Cal.App.2d 518, 522; State Guaranty Corp. v. Richardson, 9 Cal.App.2d 287.

Plaintiff's Appeal.

Plaintiff appeals from that portion of the judgment determining that the conract terminated on September 4, 1947, claiming that the contract was not terminated until the date when the parties adjusted their dispute concerning the duty of defendant to repurchase the stock of its goods held by plaintiff. As a consequence plaintiff argues that it was entitled to commissions to the latter date.

The complaint for declaratory relief put in issue the question whether by the offer of September 4, 1947 to repurchase these goods the contract was terminated, plaintiff asserting that it could only be terminated by the thirty day notice provided for in the contract.

[6] The offer to repurchase, conditioned as it was, was unacceptable to plaintiff. The obligation to repurchase was by the express terms of the contract only cast on defendant *upon the termination of the contract.* When the parties advised the court that this issue, which arose out of the qualified offer of September 4, 1947 to repurchase had been settled and adjusted it was a fair inference to draw that the parties had elected to treat the offer of September 4, 1947, which was thus compromised, as the date of termination of the contract.

[7] Nothing except the fact that this dispute had been settled and adjusted appears in the record. The burden is cast on an appellant to present a record affirmatively showing the error asserted on appeal. Vaughn v. Jonas, 31 Cal.2d 586, 601; Palpar, Inc. v. Thayer, 83 Cal.App.2d 809.

Judgment affirmed, without costs to either party.

NOURSE, P. J., and SCHOTTKY, Justice pro tem., concur.

102 Cal.App.2d 911

HOLMES et al. v. GRANGE FRATERNAL FIRE INS. ASS'N OF CALIFORNIA.

Civ. 7855.

District Court of Appeal, Third District, California.

March 19, 1951.

Hearing Denied May 17, 1951.

Action by Elgin H. Holmes and others against The Grange Fraternal Fire Insurance Association of California on a fire policy issued by defendant. The Superior Court, Tuolumne County, J. T. B. Warne, J., rendered judgment for plaintiff and defendants appealed. The District Court of Appeal, Adams, P. J., held that where named plaintiff was not a member of Order of Patrons of Husbandry of the Grange at time policy was issued as required by the by-laws of the defendant, plaintiff was not eligible to insure property at time policy was issued and even if he had been he would have ceased to be when dues became over seven months in arrears, as provided by the bylaws of defendant.

Judgment reversed.

1. Insurance 🔑55

Where by-laws of fraternal fire insurance association authorized issuance of fire policy to members of Grange who were members of Patrons of Husbandry in good standing and provided that member of association should cease to be such if his dues became more than seven months in arrears, plaintiff, who was not a Patron of Husbandry when policy was issued, was not eligible to insure property and even if he had been he would have ceased to be when his dues became over seven months in arrears. Insurance Code, §§ 9080–9093.

2. Husband and wife 🔑249

Fact that plaintiff married after he contracted to purchase realty did not give wife any interest in property.

3. Husband and wife 🔑248½

Separate property of husband before marriage presumably continues to be such after marriage.

4. Homestead 🔑47

Where husband contracted to purchase realty prior to his marriage, filing of declaration of homestead by wife thereafter gave her no title or interest in property.

5. Homestead 🔑12

A homestead right is not an estate in land, but a mere privilege of exemption from execution of such estate as holder occupies.

6. Insurance 🔑115(2)

Where fire policy issued by defendant fraternal fire insurance association was issued to plaintiff husband on realty which he contracted to purchase prior to his marriage, fact that property constituted wife's home at time policy was issued and that she filed a declaration of homestead gave her no title or insurable interest in property. Insurance Code, §§ 9080, 9081, 9085, 9089, 9090–9092.

7. Insurance 🔑731

Liability of members of mutual benefit associations to assessments depends largely on construction of particular contract and right to assess is to be strictly construed and can be exercised only when conditions prescribed in contract exist.

8. Estoppel 🔑92(2)

Fact that regular members of a mutual insurance company have received benefits of their insurance does not estop them to deny their liability to assessments for losses on policies issued to nonmembers. Insurance Code, §§ 9080, 9081, 9085, 9089, 9090–9092.

9. Insurance 🔑55

Where neither plaintiff husband or wife were members of Patrons of Husbandry at time fire policy was issued to them by fraternal fire insurance association, as required by by-laws of association, policy never became effective and plaintiffs could not recover thereon. Insurance Code, § 9085.

10. Insurance 🔑645(1)

Where plaintiffs contended that insurer never paid back or offered to return premiums which it received from plaintiff wife for fraternal fire insurance policy but there was no request in complaint for return of premiums, plaintiffs could not rely on waiver or estoppel on part of insurer to recover on fire policy.

Busick & Busick Charles O. Busick, Sr., Sacramento, for appellant.

Bush & Ackley By David F. Bush, Oakdale, and T. R. Vilas, Sonora, for respondents.

ADAMS, Presiding Justice.

This action was brought by Elgin H. Holmes, Katherine Holmes Jenness and Lucebia Bennett to recover upon an insurance policy issued by defendant on or about May 2, 1947. A verdict for plaintiffs was followed by a judgment from which this appeal was taken. The evidence shows that on May 31, 1946, plaintiff Elgin H. Holmes entered into an agreement with Lucebia Bennett to purchase from her certain real property situated near Sonora in Tuolumne County, for the sum of $8500. A payment of $2000 was made at that time and it was agreed that the balance should be paid in monthly installments thereafter, deed to be executed by seller upon receipt of $3000, the unpaid balance to be secured by a deed of trust.

On February 24, 1947, Elgin H. Holmes was married to Katherine, now plaintiff Katherine Holmes Jenness. Shortly thereafter Holmes and his wife made application for membership in Sonora Grange No. 705, and on March 7, 1947, paid their initiation fees of $1 and took two of the four degrees conferred by that organization. They did not take the third and fourth degrees which were necessary to constitute them members of the Order of Patrons of Husbandry, and they did not pay any dues at that time.

Defendant was a fraternal fire insurance association authorized under the laws of this state to insure against loss by fire property belonging to members of Sonora Grange No. 705 who were eligible to insure therein.

On April 21, 1947, Elgin H. Holmes filed with John Tallent, a soliciting agent for Sonora Grange No. 705, an application for fire insurance on the property which he had contracted to purchase, and certain furnishings in the house thereon. In said application he represented that he was "a member of the Order of Patrons of Husbandry, in good standing, in Sonora Grange No. 705," and stated that he "owned" the property therein described. In answer to interrogatories set forth in said application it was recited that his title to the land was "deed of trust," that there was an encumbrance of $6000 held by Mrs. Lucebia Bennett, and that the nature of the encumbrance was "mortgage"; that the premises were occupied by owner. It contained the following as well: "I hereby further warrant, covenant and agree with said Association that the foregoing is a full, just and true exposition of all facts and circumstances conditions, situation and value of property, so far as the same are known to me, and material to the risk; * * * I further agree to be governed by, and to abide by, the Articles of Incorporation and By-laws of said association now in force or hereafter enacted, and to pay all assessments made against me in accordance therewith."

The application was signed "Elgin H. Holmes," and no reference was made therein to Mrs. Holmes, nor did she sign the application. Attached to and made a part of such application was a statement of the provisions of law authorizing the organization of fraternal insurance associations and governing same. (See Act 688, Deering's General Laws, 1931 Edition, p. 354; also see Ins. Code, secs. 9080–9093.) A copy of the by-laws of the defendant Fire Association was attached. They provided that property belonging to Patrons of Husbandry was insurable with the Association within specified limits. They also provided that any person becoming insured therein must comply with its rules, regulations and by-laws, must be and continue to be a Patron of Husbandry in good standing, must be the lawful owner of the property insured; and that his policy should become void if his dues to the Grange became more than seven months in arrears. It was also provided that the Association should not be bound by any act, statement or agreement made by its agent or solicitor unless the same was agreed to by the Association by endorsement on the policy; that all conditions and stipulations printed on the face of the policy or application should be accepted as part of the rules and regulations of the Association.

A policy of insurance was issued to Elgin H. Holmes and forwarded to him, but he did not receive it personally as he had departed for Guam. He did not, before his departure, become a Patron of Husbandry in Sonora Grange No. 705, or any other Grange. He did not pay the premiums on the policy, nor did he pay any dues to the Grange until June 4, 1948, after the fire, at which time he was over a year in arrears. The policy issued to him contained the same matter which was made a part of the application, and on the first page thereof it was stated: "The By-Laws of this Association are to be resorted to and used to explain the rights and obligations of the parties hereto in all cases not herein otherwise especially provided for, and are hereby made a part of this policy. This policy is made and accepted upon the above express condition." The application was also made a part of the policy by reference.

On April 28, 1947, Mrs. Holmes recorded a declaration of homestead on the property described in the insurance policy, in the affidavit attached to which she stated that she was the owner of the property described in the declaration. On or about May 8, 1947 she filed in Tuolumne County an action for divorce from Holmes, in which she asserted that there was no community property. About that time, and before May 15, 1947, she called upon agent Tallent regarding the insurance, saying that Mr. Holmes had left and had not paid the premium. Tallent suggested that the policy be changed to her name. Tallent then wrote the following letter to the appellant insurance company: "Inclosed find another application for insurance and returning the policy for the Elgin Holmes, this party brought the policy to me to have changed, it seems the insurance should have been made out to Mrs. Elgin Holmes, —(as she pays the bills) and the check is made out in her former name, by her, so if that is satisfactory then you can return the policy to Elgin Holmes, Route 2, Sonora. Hope it is okey."

However, no new application was made. The secretary of the Association changed the name on the face of the policy by inserting "Mrs." in front of the name "Elgin H. Holmes," wherever it appeared, and returned the policy after attaching a "Correction of Name of Assured" which recited: "It being understood that title to the property insured under the above policy is vested in the name of Mrs. Elgin H. Holmes, the name said Mrs. Elgin H. Holmes is hereby recognized as the sole insured under the terms and conditions of this policy." Mrs. Holmes issued a check to pay the premium, and Tallent forwarded the check to the insurance company. Mrs. Holmes was not, at that time, a Patron of Husbandry, and she did not take the third and fourth degrees and become such until April 16, 1948, just shortly before the fire which destroyed the house and contents on May 26, 1948.

In the meantime Mrs. Holmes had filed a complaint for divorce in Nevada, and a decree was granted November 22, 1948. A property settlement was executed by the parties dated October 8, 1948, which recited that Mrs. Holmes had executed to her husband a quitclaim deed to the property formerly occupied by them and that she transferred to him all her interest in any personal property. She agreed to sign a relinquishment of all her interest in the insurance policy on the property destroyed by fire so that the husband might collect the full amount due thereunder.

Appellant's first contention is that the verdict is not supported by the evidence since it is uncontradicted that Elgin Holmes was not a Patron of Husbandry and that he became more than seven months in arrears in the payment of dues to the Grange, wherefore the policy, if ever valid, was rendered void; that no valid policy was ever issued to Mrs. Holmes because when the policy was changed she was not a Patron of Husbandry, and that she had no insurable interest in the property insured; also that the policy had been changed to her name upon the understanding that the policy should have been issued to her originally and that she was the owner of the property; and that her interest, if any, was never represented to the Association or described correctly, though the policy provided: "Any false representation by the insured of the conditions, situation or occupancy of the property or otherwise, or any omission to make known any fact material to the risk, or an over valuation, or any misrepresentation whatsoever, either in written application or otherwise, shall render this policy void and of no effect * * * or if the interest of the insured in the property, whether as owner, trustee, consignee, factor, mortgagee or otherwise, if the interest of the insured be any other than the entire, absolute, unconditional and sole ownership of the property, both at law and in equity, it must be so represented to the Association, and so expressed in the written portion of this policy, and such interest correctly described, otherwise this Association shall not be liable by virtue of this policy."

Regarding Fraternal Fire Insurance, section 9085 of the Insurance Code provides: "A risk shall not be written by such association except for members in good standing on the books on the society forming the association. A suspension or withdrawal from membership in such society shall suspend the insurance until the member is restored to good standing in the society and association. A restoration to membership after suspension therefrom shall not extend the term of the insurance." Section 9089 of said Code contains the provision that such association may make such by-laws, not inconsistent with the laws of this state, as are necessary for its government and for the transaction of its business; and section 9092 provides that persons insuring property with the association shall, at the time of effecting the insurance, pay such charges as are required by the rules or by-laws of the association.

The by-laws of defendant association, which, as aforesaid, constituted a part of the policy sued upon, provided that any person becoming insured therein must comply with the rules, regulations and by-laws, and must be, and continue to be, a Patron of Husbandry in good standing.

The evidence shows, without conflict, that Elgin Holmes was not a Patron of Husbandry, that he did not pay any dues to the Grange until after the fire, and that at the time the property was destroyed he was over seven months in arrears; and that Mrs. Holmes was not a Patron of Husbandry when the name on the policy was changed, and that she was not the owner of the property.

[1] The by-laws also provided that a member of the association should cease to be such if his dues became more than seven months in arrears. We conclude, therefore, that Elgin H. Holmes was not eligible to insure the property at the time the policy was issued, and even if he had been he would have ceased to be when his dues became over seven months in arrears. Respondents, in their opening brief, in effect concede this to be true. Their claim is that the policy runs to Mrs. Holmes. As originally written, the policy alleged that Katherine and Elgin Holmes were husband and wife living in the house insured, but no interest of said wife in the real property was alleged. It did not purport to insure the wife against loss, but only Elgin H. Holmes. It was never assigned to Mrs. Holmes. The changes were made without the knowledge or consent of Elgin H. Holmes, and no change in the ownership of the property was effected. At the trial Katherine attempted to show that she was part owner, by testifying that she had put money into the purchase price; but when this was done was not shown, and there is no evidence that she had put any money into it before the policy was issued. She gave no testimony as to any ownership of the personal property except to say that it belonged *either* to her or to Mr. Holmes; and the agreement to purchase from Mrs. Bennett was made before the marriage and the contract was entered into by Elgin alone.

The fact that the property constituted her home at the time the policy was issued would not, of course, affect the title of her husband who, before their marriage, and when, as she testified, they were "engaged," had contracted to buy it in his own name. She testified that she "was induced to invest her separate funds in the maintenance and operation of said *ranch* * * * upon the express promise" of Holmes to reimburse her. Holmes at the trial testified that he was the owner of the property but stated that he claimed Mrs. Jenness had an interest in the ranch because of money she "loaned" him. There is no evidence that her funds were expended upon the *house, except* that she testified that after the issuance of the policy she had it painted, the roof repaired, and the foundation enclosed. How this was paid for does not appear. The complaint fails to allege any interest of Katherine in the house.

[2, 3] The fact that Katherine became the wife of Elgin after the contract was made with Mrs. Bennett did not give her any interest in the property. If it was separate property of Elgin before the marriage it presumably continued to be such. In re Miller, 31 Cal.2d 191, 197, 187 P.2d 722; Boyd v. Oser, 23 Cal.2d 613, 621, 145 P.2d 312; Palen v. Palen, 28 Cal.App.2d 602, 604, 83 P.2d 36.

[4–6] The filing of the declaration of homestead gave Katherine no title or interest in the property. This court said, in Arighi v. Rule & Sons, Inc., 41 Cal.App.2d 852, 855, 107 P.2d 970, 972, that "the homestead right is not an estate in the *land,* but a mere *privilege* of exemption from execution of such estate as the holder occupies." Also see Snodgrass v. Parks,

79 Cal. 55, 58, 21 P. 429; Smith v. Bangham, 156 Cal. 359, 366, 104 P. 689, 28 L.R.A.,N.S., 522; Jacobson v. Pope and Talbot, 214 Cal. 758, 762, 7 P.2d 1017; In re Rauer's Collection Co., 87 Cal.App.2d 248, 261–262, 196 P.2d 803; Alexander v. Jackson, 3 Cal.Unrep. 344, 349, 25 P. 415.

Section 9080 of the Insurance Code at the time this policy was issued provided that except as provided in Chapter 7, which is entitled Fraternal Fire Insurers, an association organized and operating thereunder is not governed by the insurance code or other insurance laws of the state. Section 9081 specifies who may form insurer associations, under which members bind themselves to contribute to each other's losses by fire. Section 9085 provides that a risk shall not be written by such association except for members in good standing on the books of the society forming the association. Section 9089 authorizes such association to make such by-laws, not inconsistent with the laws of this state, as are necessary for its government and the transaction of its business. Sections 9090–9092 provide that the members of such an association mutually agree to participate in each other's fire losses, and to pay their share of the losses and expenses of operation during the life of their policies; and that, at the time of effecting insurance, applicants shall pay such charges as are required by the rules or by-laws of the association.

From the foregoing it is obvious that fire losses of members can be paid only by assessments levied upon the members; and there seems to be ample authority to the effect that no valid assessment for such a purpose can be imposed unless there has been compliance with the prerequisite conditions. It is said in 3 Couch on Insurance, Sec. 595a, p. 1910: "An assessment cannot be validly made unless the necessity therefor properly and legally arises within the contemplation of the contract therefor, since it is upon such conditions that the members have promised to contribute. In fact, not only must every prerequisite to its validity be complied with, but it must be made for a proper purpose; otherwise payment thereof cannot be enforced. In other words, the facts must be such as to occasion a legal necessity for the making of an assessment, since the contract is a conditional promise to pay, being premised upon certain contingencies in the nature of conditions precedent which must exist; otherwise, an assessment will have no validity, and will be unenforceable."

[7, 8] In 2 Cooley's Briefs on Insurance, pages 1678–1679, we find: "The liability of members of mutual benefit associations to assessments depends largely on the construction of the particular contract. The right to assess is to be strictly construed, and can be exercised only when the conditions prescribed in the contract exist. Wayland v. Western Life Indemnity Co., 166 Mo.App. 221, 148 S.W. 626." And it is stated in 3 Joyce on Insurance, sec. 1271, p. 2404: "The fact that regular members of a mutual insurance company have received the benefits of their insurance does not estop them to deny their liability to assessments for losses on policies issued to nonmembers."

[9] We conclude that since neither Elgin Holmes nor his wife was eligible for insurance with appellant, the policy sued upon never became effective, and that none of the plaintiffs is entitled to recover thereon.

Appellant, in addition to the foregoing, urges that in the application for the policy Holmes misrepresented the terms of his agreement with Mrs. Bennett; and that there were errors in the instructions given and in the refusal of others; but since we have concluded that the policy never became effective for the reasons heretofore stated, it is unnecessary to consider other contentions.

[10] Respondents urge that appellant has never paid back or offered to return the premium which it received from Mrs. Holmes, to wit, $33.60. There was no request in the complaint for return of premium, nor any waiver or estoppel pleaded. It was said in Goorberg v. Western Assurance Co., 150 Cal. 510, at page 519, 89 P. 130, at page 133, 10 L.R.A.,N.S., 876: "Furthermore, the retention of the premium was not pleaded by the plaintiff. His

complaint showed affirmatively that there had been a breach of warranty as to title, and to overcome this he was obliged to allege facts showing a waiver or estoppel. He met this requirement by alleging the issuance of the policy by the defendant after notice of the defect of title, but this did not put in issue any waiver or estoppel that might have been created by other facts. If the plaintiff relies on waiver or estoppel as to any defense which would otherwise be available to the defendant under the facts stated in the complaint, the facts constituting such waiver or estoppel must be pleaded in the first instance. 19 Cyc. 923; Gillon v. Northern Assurance Co., 127 Cal. 480, 59 P. 901; Vernon Ins[urance] & T[rust] Co. v. Maitlen, 158 Ind. 393, 63 N.E. 755; Bruce v. Germ. S[av.] and L[oan] Soc., 24 Or. 486, 34 P. 16; McCoy v. Iowa State Ins. Co., 107 Iowa, 80, 77 N.W. 529."

The judgment is reversed.

VAN DYKE and PEEK, JJ., concur.

BERMITE POWDER CO. v. FRANCHISE TAX BOARD.

Civ. 17763.

District Court of Appeal, Second District, Division 1, California.

March 19, 1951.

Rehearing Denied April 2, 1951.

Hearing Granted May 17, 1951.*

The Bermite Powder Company, a corporation, sued the Franchise Tax Board for interest on the amount of a refunded overpayment of franchise taxes. From a judgment of the Superior Court, Los Angeles County, Otto J. Emme, J., for plaintiff, defendant appealed. The District Court of Appeal, Hanson, J., pro tem, held that the provision of the Bank and Corporation Franchise Tax Act that a taxpayer may sue for all or any part of the amount claimed as a tax overpayment within 90 days after mailing of notice of the franchise tax commissioner's action on a claim for refund thereof was inapplicable, so that plaintiff was relegated to his common law remedy and institution of the action for interest within three years after mailing of notice of the commissioner's allowance of plaintiff's claim for refund and disallowance of interest on the overpayment was timely.

Judgment affirmed.

1. Taxation 🔑537

The constitutional provision, authorizing corporation to sue for amount of franchise tax illegally collected from it, with interest thereon, is self-executing and requires no legislation for its enforcement, and common law remedies prevail in absence of statute. Const. art. 13, § 15.

2. States 🔑191(1.3)

A constitutional provision giving a right and plainly authorizing a suit against the state for enforcement thereof need not spell out remedy to be invoked.

3. Taxation 🔑537

The Constitution gives legislature no power to prohibit taxpayer from bringing suit against state to collect amount of illegal franchise tax paid by him, nor to exclude recovery by him of interest on such amount. Const. art. 13, §§ 15, 16, subd. 2.

4. Limitation of actions 🔑4(1)

The legislature has power to impose reasonable limitation of time for taxpayer to sue state on a right created by Constitution.

5. Taxation 🔑543(8)

The franchise tax commissioner, allowing claim for refund of amount of corporation franchise tax overpayment, owed not only statutory, but constitutional duty to allow interest on such amount. Gen.Laws, Act 8488, §§ 1 et seq., 27; Const. art. 13, § 15.

6. Taxation 🔑543(3, 8)

The provision of Bank and Corporation Franchise Tax Act, authorizing taxpayer, whose claim for refund of franchise tax overpayment is allowed only in part or disallowed by franchise tax commissioner, to sue him for all or any part of amount claimed within 90 days after mailing of notice of commissioner's ruling, is inapplicable to action for interest on amount of overpayment allowed in full by commissioner without interest, but taxpayer, in such case, is relegated to common-law remedy limited by general three-year statute, so that such action, instituted within three years after mailing of notice of commissioner's ruling, is timely. Gen.Laws, Act 8488, § 30(b); Code Civ.Proc. § 338.

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* Subsequent opinion 242 P.2d 9.

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Fred N. Howser, Atty. Gen., James E. Sabine, Deputy Atty. Gen., Irving H. Perluss, Deputy Atty. Gen., for appellant.

Arthur A. Armstrong, Los Angeles, for respondent.

HANSON, Justice Pro Tem.

The Franchise Tax Commissioner allowed and paid the respondent taxpayer corporation's claim for refund of its overpayment of taxes in the amount of $31,688.34, but he improperly disallowed and failed to pay interest on the overpayment amounting to $4,404.04. The only question presented for decision is whether the respondent is barred from recovering the interest, which should have been paid to it, merely because it failed to institute its action within 90 days after the mailing of the notice of the Commissioner's action.

The respondent taxpayer during the years 1943 and 1944 was engaged in the business of "loading" ammunition, for the most part apparently, under contracts it had with the federal government. For those years it correctly made and filed returns of the net income it had made, including therein the profits it had derived from its government contracts. On the returns thus made it paid the franchise tax due to the State. Subsequently the federal government "renegotiated" the contracts and as a result respondent was required to repay to the government approximately two-thirds of the net income it had reported to the Franchise Tax Commissioner for the two years in question.

The Constitution of this state (Article XIII) provides that "All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided." By section 16, subd. 2, of the same article the Constitution provides that "The Legislature may provide by law for the taxation of corporations, their franchises, or any other franchises, by any method not prohibited by this Constitution or the Constitution or laws of the United States." The same article further provides that after the levy and payment of any tax imposed under the provisions of the article, the taxpayer may maintain an action "to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected." (Art. XIII, sec. 15.) Purporting to act in accordance with these provisions of the Constitution the legislature enacted the so-called Bank and Corporation Franchise Tax Act, Gen.Laws, Act 8488, § 1 et seq. Under the provisions of that act it is expressly provided that a taxpayer may file with the Commissioner a written claim for a refund of any overpayment he had made in respect to taxes. "If, in the opinion of the commissioner, * * *, there has been *an overpayment of tax, penalty or interest by a taxpayer* * * *, the amount of *such overpayment* shall be * * * refunded to the taxpayer * * *." (Italics supplied.)

If the Commissioner allows the claim for overpayment in whole or in part the taxpayer is entitled by statute to interest at the rate of 6% on the amount allowed unless the overpayment is occasioned "because of an error or mistake on the part of the taxpayer". Gen.Laws, Act 8488, § 27. If the Commissioner does not allow the claim for *overpayment* or allows it in part only the taxpayer may within 90 days of the mailing of notice from the Commissioner to that effect institute an action to have refunded to him the amount of the overpayment.

The Commissioner in the instant case as stated allowed the claim for overpayment in full and what is more paid it, but he declined to allow interest thereon because of certain alleged errors or mistakes on the taxpayer's part. It is unnecessary here to set these forth as the Commissioner concedes he lacked justification therefor and hence should have paid the claim *with interest*. Nevertheless, he is here contending that the taxpayer may not now recover the unpaid interest on the sole ground that it failed to sue therefor within 90 days after the mailing of the notice of the disallowance of the interest. The contention is based on Section 30(b) of the Franchise Tax Act which will shortly be considered, but which we pass for the moment in order to restate certain fundamental principles of law which are here applicable and controlling.

[1, 2] The Constitution expressly grants to the legislature the power to impose a franchise tax on corporations, but it also expressly gives to a taxpayer who has paid such a tax the right to sue to recover so much of the tax as has been illegally collected *"with interest"* thereon. This latter provision of the Constitution is self-executing and requires no legislation for its enforcement. In the absence of statute the common law remedies prevail and are adequate. It is not necessary where the Constitution gives a right and plainly by its language, as here, authorizes a suit against the State that it should spell out the remedy to be invoked. Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505.

[3, 4] While the legislature was given the power to impose a franchise tax on corporations it was not given the power to prohibit a taxpayer from bringing suit to collect an illegal tax which he had paid and it was not given the power to exclude a recovery by him of interest on the tax that was illegally collected. The legislature, however, is invested with the power to impose a reasonable time limitation upon the taxpayer suing the State upon a right created by the Constitution. We assume, without deciding, that the legislature, despite the constitutional provision in favor of the taxpayer, had the power to require the taxpayer to file with an administrative officer a claim that the State had illegally collected a tax, as a condition to instituting an action therefor in the courts.

[5] Turning to the Franchise Tax Act we find as has already been stated that the legislature has expressly provided that where the administrative officer finds that there has been an overpayment of a tax that the amount of the overpayment shall be refunded to the taxpayer *with interest*, unless the overpayment is occasioned "because of an error or mistake on the part of the taxpayer" in which case interest is not to be allowed. Whether the exception is permissible under the Constitution we have no occasion to decide, as the Commissioner concedes there was no error or mistake on the part of the taxpayer and that under the statute he should have allowed not only the overpayment, but interest thereon. In the case before us then it was not only the statutory but the constitutional duty of the Commissioner when he allowed the overpayment to have allowed interest thereon. In short, the allowance of the overpayment carried with it as a matter of course interest upon it.

[6] Turning again to the statute, we observe that if the Commissioner does not allow the "overpayment" (the tax, with any penalty or interest thereon) in full, but only in part or not at all that the taxpayer is required by Section 30(b) of the Act to file his action in court within 90 days after the mailing of the notice of the disallowance. But in the instant case there was no disallowance of the overpayment claimed—it was allowed in full. To be sure there was a refusal to pay interest on the overpayment, but such interest was no part of the "overpayment" which the taxpayer had made. Section 30(b) of the Act[1] it is plain, from a reading of its language, has no application to such a situation. If the Commissioner had allowed the overpayment and interest on it and the State had refused to pay one searches the Act in vain to find therein a remedy or a limitation thereon. Accordingly, in such a case the taxpayer

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[1] Sec. 30(b): "Within 90 days after the mailing of the notice of the commissioner's action upon any refund claim, * * *, the taxpayer may bring an action against the commissioner on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment."

is relegated to his common law remedy and the limitation upon its exercise is the general three-year statute of limitations. (Code Civ.Proc. sec. 338.)

Accordingly, the action for interest on the "overpayment" having been instituted within three years, it was timely.

Judgment affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

102 Cal.App.2d 878

KRECK v. BRUNDIGE et al.

Civ. 18007.

District Court of Appeal, Second District, Division 2, California.

March 19, 1951.

Rehearing Denied April 14, 1951.

Hearing Denied May 17, 1951.

Action for declaratory relief by Charles W. Kreck against Roy S. Brundige and Bank of America National Trust & Savings Association, as executor of the last will and testament of Arthur Charles Chester, deceased, for an adjudication of plaintiff's rights and those of defendants under an agreement to advance monies executed by plaintiff and defendant Brundige and a contract of guarantee executed by plaintiff, Brundige and Arthur Charles Chester. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., rendered judgment for plaintiff and defendant Bank of America appealed. The District Court of Appeal, Wilson, J., held that under agreement executed by plaintiff, defendant Brundige and Chester whereby plaintiff agreed to advance money for development of an invention of defendant Brundige, additional amount owed Chester by Brundige for repurchase of Chester's one-half interest in invention was to be paid from any profits received by either Brundige or plaintiff, and not money advanced by plaintiff to Brundige.

Judgment affirmed.

Joint adventures 🔑2

Where plaintiff agreed to advance money to defendant for development of invention in return for an undivided one-half interest in royalties from licensing agreements, and defendant agreed to use portion of initial advancement to exercise his option to re-purchase one-half interest in invention and patent applications assigned to codefendant and plaintiff, defendant and codefendant executed guaranty agreement which provided that payment of balance owing codefendant was to be conditional on receipt by either plaintiff or defendant of any benefits, etc., from patent and patent application, balance owing codefendant was to be paid from anticipated profits, rather than sums advanced by plaintiff to defendant for development of invention, as contended by codefendant.

G. L. Berrey and William Horace Sinclair, Los Angeles, for appellant, Bank of America as executor, etc.

Harrison Weil, Los Angeles, for respondent, Kreck.

WILSON, Justice.

By this action for declaratory relief plaintiff seeks an adjudication of his rights and those of defendants under an "Agreement to Advance Moneys" executed by plaintiff and defendant Brundige and a "Contract of Guaranty" executed by plaintiff, Brundige and Arthur Charles Chester. From a judgment in favor of plaintiff, defendant Bank of America as Executor of the Last Will and Testament of Arthur Charles Chester, deceased, has appealed. No appeal has been taken by defendant Brundige.

Brundige is the inventor of a process used in connection with the manufacture of plywood and for laminated structures. In January, 1945, he assigned to Chester a one-half interest in his invention and the patent applications thereon pursuant to an agreement entered into between them in August, 1944, whereby Chester advanced monies to Brundige to finance him in applying for and obtaining the patents. On January 16, 1946, Brundige and Chester executed an "Option to Purchase an Interest in an Invention and Patent Application Therefor" wherein Chester agreed to resell to Brundige his one-half interest for $19,000. The option provided that it was to be exercised within ninety days from date by payment of $9,000 cash, the balance to be paid within five years with interest at the rate of 6 per cent. The down payment represented the return of Chester's investment. If the option were exercised, Chester agreed to execute an assignment to Brundige to be held in trust until the balance of the purchase price had been paid in full.

Prior to the expiration of the option agreement Brundige succeeded in interesting plaintiff in financing him in the further development of his invention. Accordingly, on March 27, 1946, plaintiff and Brundige entered into an "Agreement to Advance Moneys" and on April 9, 1946, plaintiff, Brundige and Chester executed a "Contract of Guaranty" in the provisions of which was included a modification of the option agreement between Brundige and Chester.

Agreement to Advance Moneys.

The Agreement to Advance Moneys provides that plaintiff is to furnish funds from time to time to Brundige upon his request and in such sums as he might require up to a total amount of $50,000; an initial advance of $19,500 shall be deposited in a commercial account in the joint names of plaintiff and Brundige; of that sum $9,000 shall be paid immediately to Chester as the initial payment for his one-half interest under the option agreement. The purposes for which the funds were to be used are specified, one of which was to exercise the option to purchase the one-half interest of Chester. In consideration for the advance plaintiff was to receive "an undivided one-half interest in and to the considerations, returns and royalties from licensing said inventions, or the sale thereof * * *". It was also agreed that plaintiff could withdraw from the agreement at any time upon giving thirty days' notice in writing to Brundige and paying the sum of $1,000. In the event plaintiff should exercise his right of withdrawal, Brundige agreed to assign to him "an undivided interest in and to any royalties, avails, moneys that may come out of any license agreements or sales, which shall represent a proportionate interest in said royalties or payments equal to the amount Second Party [Kreck] has advanced up to the time of his withdrawal and written notice, based upon a valuation of $100,000 * * *".

The sum of $9,000 was paid to Chester who thereupon assigned his one-half interest in the invention and the patent applications to Brundige.

After plaintiff had advanced approximately $31,000 under the agreement he elected to withdraw and tendered $1,000 to Brundige, demanding an assignment in accordance with the contract. Brundige tendered plaintiff an assignment of a 31.1 percent interest in and to "any royalties, avails, moneys and considerations that may come out of any license agreements or sales under or on account" of the agreement of March 27, 1946. Plaintiff objected to this assignment, deeming himself entitled to an interest in the patent or patents. The trial court found that the assignment tendered was in compliance with the contract and the issues between plaintiff and Brundige are not involved in this appeal.

Guaranty Agreement

The Guaranty Agreement executed by plaintiff, Brundige and Chester recites the assignment by Brundige to Chester of an undivided one-half interest in his invention and the patent applications, and the option agreement entered into between Brundige and Chester providing for the resale of Chester's interest to Brundige; that it is the intention of plaintiff and Brundige to enter into an agreement relating to the invention which would be mutually beneficial, "more particularly so if the said Arthur Charles Chester may be persuaded to and become willing to modify in certain particulars that certain option to purchase executed on January 16, 1946, * * * "; that "to the end that said Second [Brundige] and Third [Kreck] Parties may mutually and severally benefit as between themselves by a modification of said Option to Purchase" Brundige and Kreck specifically request that Chester release Brundige from the unconditional obligation to pay the sum of $10,000 in excess of the down payment of $9,000, and to make such payment conditional on the happening or occurrence of certain events and request Chester to eliminate all interest charges; that should Chester accede to such request he will suffer a prejudice as a result of his forbearance and Kreck will have benefit conferred upon him.

The parties agreed: "First: Third Party [Kreck] hereby agrees that, as an inducement to First Party [Chester] to eliminate the provision for charging interest on any portion of the purchase price not included in the original down payment required under said Option to Purchase, and by making the payment of the additional Ten Thousand Dollars ($10,000) of the total sale price of Nineteen Thousand Dollars ($19,000), instead of unconditional in order to receive the assignment of interest from First Party, as provided in said agreement executed January 16, 1946, to be conditional on the receipt by either Second Party [Brundige] or by Third Party of any benefits, royalty payment, or other consideration arising from the ownership, transfer, conveyance, sale or gift of any right, title or interest of either said Second Party or said Third Party in and to said Patent and Application for Patent, or to any benefits accruing therefrom, and that Third Party will and he hereby does guarantee payment to First Party of any and all sums received by either Second Party or by Third Party arising or accruing as a result of the ownership of or interest in said Patent and Patent Application, up to and including the sum of Ten Thousand Dollars ($10,000) representing the unpaid portion of the said Purchase and Sale price of the said interest of First Party in and to said Patent and Patent Application, as more fully set forth in said Exhibit 'A'; this guaranty is hereby made by Third Party regardless of the ability or willingness of Second Party to pay, and Third Party hereby waives notice to him of any default by Second Party. Third Party further agrees that any gift, conveyance, transfer, judgment, lien, execution or other instrument having the effect of extinguishing the right, title, ownership or interest of either Second or Third Party in and to said Patent, Application for Patent, or benefits receivable therefrom to either Second or Third Parties, or any operation of law which shall cause such an extinction of interest, shall forthwith constitute an obligation on the Third Party to pay to First Party the said Ten Thousand Dollars * * *".

Similar language is used under the heading "Intent", wherein the parties agree that instead of the $10,000 payment being conditioned on its being made to Chester before the assignment of his interest to Brundige, it was conditioned on the receipt by either Brundige or Kreck of any "benefits, royalty payment, or other consideration arising from the ownership, transfer, conveyance, sale or gift of any right, title or interest" by either Brundige or Kreck in the invention and Application for Patent or to any benefits accruing therefrom. Brundige agreed, as a consideration to Chester for executing the agreement, to apply on the unpaid portion of the amount due Chester any and all sums, up to $10,000, received by Brundige arising from or accruing as a result of his ownership or interest in the invention and application for patent.

It is appellant's contention that the following findings and conclusions of the trial court are contrary to law and the evidence: "That the defendant Bank of America National Trust and Savings Association * * * is not entitled to the payment of $10,000.00 from either plaintiff or defendant Roy S. Brundige for the reason that the conditions under which the same may become payable as provided in said 'Guaranty Agreement' do not exist and have not occurred. That it was neither the intention of the parties nor the effect of the 'Guaranty Agreement' that said $10,000.00 was to be paid from any funds advanced by the plaintiff under the 'Agreement to Advance Moneys' for the purpose of obtaining patents or for the exploitation of the invention; that all the sums heretofore advanced or paid by plaintiff to defendant Roy S. Brundige were for such purposes."

Appellant maintains that since Brundige received in excess of $10,000 from plaintiff by reason of his ownership and interest in his invention and patent applications in return for which plaintiff received a 31.1 percent interest, judgment should be entered in its favor against plaintiff and Brundige in the amount of $10,000; that the Guaranty Agreement is clear and unambiguous; that Chester did not know the provisions of the financing agreement between plaintiff and Brundige and that agreement cannot be used to change the meaning or to limit the clear and unambiguous provisions of the Guaranty Agreement.

Contrary to appellant's contention, the language of the Guaranty Agreement specifying the contingency upon which the $10,000 shall become due and payable is not so clear and unambiguous as to make the intention of the parties manifest. It becomes necessary, therefore, in construing the contract to consider the circumstances surrounding its execution, including the execution of the Agreement to Advance Moneys. The two instruments must be interpreted together relating as they do to the same subject. When so considered it becomes apparent that it was the intention of the parties that the $10,000 was to be paid from anticipated profits and not out of any sums which plaintiff was to advance to Brundige to finance him in the development of his invention.

Chester had advanced $9,000 to Brundige for which he received a one-half interest in the invention and patent applications. Brundige was in need of additional financing. Chester agreed to resell to Brundige his interest for $19,000, of which amount $9,000 was to be paid upon the exercise of the option and the balance to be paid within five years, with interest. Brundige then succeeded in interesting plaintiff in providing the funds he required. Plaintiff agreed to advance up to $50,000 provided Chester could be induced to modify his option agreement. As the result of the negotiations, plaintiff executed the Agreement to Advance Moneys in which it was agreed that plaintiff would make an initial advance of $17,500, out of which Chester was to be paid $9,000 immediately. The three parties then executed the Guaranty Agreement in which Chester agreed that the payment of $10,000 instead of being unconditional—instead of being paid within five years with interest—was to be conditioned upon the receipt by either plaintiff or Brundige of any benefits, royalty payment or other consideration. The agreement recites that plaintiff and Brundige are entering into an agreement relating to the invention which will be mutually beneficial. While Chester may not have known the precise terms of such agreement it is inconceivable that he did not know plaintiff was going to furnish financial aid to Brundige and the reason why he, Chester, was asked to modify his option agreement.

Had Chester expected to receive his full $19,000 out of the first moneys plaintiff advanced there would have been no forbearance upon his part nor any need for him to agree to modify his option. Since the Guaranty Agreement refers to Kreck's interest in the invention, Chester must have known that Kreck either had acquired or would acquire such interest and had the parties intended that moneys advanced or paid by Kreck to Brundige for that interest was to go first to Chester, the agreement would have so provided. However, the Guaranty Agreement makes no reference to any money received or to be received by Brundige from plaintiff but the $10,000 payment is conditioned upon sums which may be received by either Brundige or plaintiff. The inference is that the money is to be received from third persons and the parties must have intended by that language that out of any profits which might be received by either Brundige or plaintiff, Chester was to receive the first $10,000.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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PEOPLE v. AVILLA.

Cr. 747.

District Court of Appeal, Fourth District, California.

March 26, 1951.

Anthony Avilla was convicted in the Superior Court of San Diego County, William A. Glen, J., of second degree murder, and he appealed from the judgment and from an order denying his motion for new trial. The District Court of Appeal, Barnard, J., held that evidence was sufficient to support the conviction.

Affirmed.

1. Homicide ⚷254

Evidence supported conviction of murder in the second degree based on defendant's shooting of his wife, as against contention that shot was fired in such a sudden passion as would necessarily reduce crime to manslaughter.

2. Criminal law ⚷829(21)

In murder prosecution, refusal of defendant's requested instruction relating to commission of crime under heat of passion was not error, where matter in defendant's requested instruction was clearly and completely covered in the instruction given.

Johnson & Johnson, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the murder of his wife and was found guilty of second degree murder. He appeals from the judgment, and from an order denying his motion for a new trial.

The appellant and his wife had been married for 33 years. He was 65 years of age, and was afflicted with some sort of heart ailment. He had had two "strokes", one of which left him blind in one eye and partially paralyzed on his left side. He had been unable to work for three or four years but was able to walk about the house and yard, and go to the grocery store. He did most of the house work while his wife worked elsewhere and supported the family. There is evidence that during this period the wife was attentive to his wants and solicitous of his welfare.

The couple lived in a small house in La Jolla. On May 10, 1950, a man and his wife who lived next door, their house being but five feet away, came over and visited from 6:00 to 8:00 P.M. They had two "short drinks" of whiskey each, except that the appellant drank two glasses of diluted wine. These neighbors went home about 8:00 P.M. and after she had prepared dinner the neighbor's wife heard a shot, and about ten minutes later another shot. Thinking he had shot at a dog, she paid no attention to it. Shortly thereafter, she heard a "pounding on the floor" which was a signal they had agreed upon in the event the appellant had one of his heart attacks and needed help. She went over and found the appellant lying on a couch in the living room. He had a bad wound in the shoulder, there was a large amount of blood on his clothing and the couch, and a rifle was lying there. When she entered the appellant said said "I shot and killed Jessie". She asked him if he realized what he had said, and he repeated the statement. She asked him where the deceased was and he answered "She is somewhere in the house." She went to the kitchen and found the appellant's wife slumped over the table, dead. Apparently, she had been sitting there curling her hair and applying cosmetics. Police officers arrived about 9:30 and the appellant told them he had shot and killed his wife and not to blame anybody but him.

The appellant was taken to a hospital and his own doctor called. He told this doctor "Jessie kept at me and kept at me and that is why this came about." In the presence of the doctor the appellant told an officer that his wife was always nagging at him and that he told her she would be sorry some day if she didn't stop. He also told the officer that his wife had become intoxicated during the evening and had cursed him; that he went to the closet, obtained the gun, loaded it with two shells and fired at his wife; that he then placed the muzzle of the gun under his left arm pit with the intention of committing suicide; and that he was disappointed that he missed the vital spot.

At 2:10 P.M. the next day, the appellant made a statement in the presence of several officers which was taken down by a reporter, and which covers fifteen pages of the transcript. This statement was made voluntarily, and it appears therefrom that the appellant answered a great number of questions intelligently, some of them at considerable length. He stated that his wife had been drinking the night before; that "she started in on me again" and he asked her to leave him alone; that he wasn't paying much attention to what she was complaining about; that she just started in "cussing" and calling him lazy and good for nothing; that he told her "I can't go on living this way. We might just as well end it up"; that he went into the living room, and got the gun which was kept in a closet; that he got a box of shells from a cupboard; that before he got the gun he said "I'll finish up the work now. I can't stand your nagging at me."; that he got the shells and said "One for me and one for you"; that he put two shells in the gun; that his wife was sitting there and no one else was present; that his wife kept on "cussing" him and he shot her; that he then "took the other one—I wanted it for my heart but I missed"; that he and his wife always got along except when she was drinking; that arguments between them had gone on for a long time whenever she would drink; and that "I simply just grabbed two shells and put them in there, one for me and one for her. I just thought that."

The appellant testified on the stand that after the neighbors left that night his wife upset him by her talk; that this had gone on for eight months and he felt he could not stand it; that his wife was nagging and fussing at him because he couldn't work; that he thought he could not "go on" any more after he threw one or two shells into the gun; that everything then went hazy; that he could remember nothing about what he had said to the neighbors or the officers, or about his statement given to the officers the next day; and that he remembered nothing until three or four days later. On cross-examination he was asked as to just what he thought at the time or about the time of the shooting. He replied "Well, I thought—well, the thing is if I am going to be like this all the time what am I doing here? I am just a burden here and I just says—I might just as well pass on. If I was going to have any hell, I thought to myself, I might just as well go some place else and have it as to stay here and have it." He was then asked whether he had told this to his wife at that time. He replied, "No, I didn't say nothing to her, any more that when I made up my mind, I said, 'Well, it is the time now to end it up.' "; that "I never said anything to her after that"; that she was sitting there and he recalled getting up and going over to get the gun; and that he knew nothing else until he was in the hospital.

[1] It is first contended that the evidence is insufficient to establish murder in the second degree, and that there is nothing in the evidence which would support any conclusion other than that the shot was fired in such a sudden passion as would necessarily reduce the crime to manslaughter. The statements and admissions of the appellant, as well as portions of his testimony, support the conclusion that the situation of which he complained had been building up for some eight months, that he came to feel that he did not want to go on with it indefinitely, and that he finally decided to take drastic means to end it. The evidence as a whole indicates this rather than that he acted unthinkingly, in the heat of passion, and as a result of a sudden quarrel. Assuming that part of the evidence might have supported a conclusion that he fired this shot in the heat of passion, the evidence is sufficient to support a contrary conclusion. Nothing more than a conflict appears, and the view taken by the jury is amply supported by the record.

[2] The only other point raised is that the court committed prejudicial error in refusing to give an instruction relating to the commission of a crime under the heat

of passion. This requested instruction stated that this heat of passion must be such as would be aroused in the mind of any reasonable person in the given facts and circumstances, and that "the conduct of the defendant is to be measured by that of the ordinarily reasonable man placed in identical circumstances." It is argued that because the appellant was an invalid he should not be judged by what is expected of an ordinarily reasonable person in good health, and that the jury should have been told, as was done by the quoted part of the requested instruction, that the appellant's conduct was to be measured by that of an ordinarily reasonable man placed in "identical circumstances." The court gave a longer and more complete instruction on this subject. In referring to how the conduct of an accused was to be measured, it used the words "in the same or similar circumstances as those in question," and later on the words "if placed in the same position in which the defendant found himself," instead of using the words "identical circumstances." The matter was clearly and completely covered in the instruction given and neither error nor possible prejudice appears.

The judgment and order are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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